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NO. _____

IN THE

Supreme Court of the United States

DON'T WASTE WASHINGTON LEGAL
DEFENSE FOUNDATION,
Petitioner,

v.

STATE OF WASHINGTON, et al.,
Defendants,

v.

WASHINGTON STATE BUILDING AND CONSTRUCTION
TRADES COUNCIL, AFL-CIO, et al.,
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ABCD AT CRAFTSMAN PRESS, SEATTLE

QUESTIONS PRESENTED

1. Is a state law (Initiative 383) limiting import of low-level radioactive wastes consistent with the Commerce Clause, when enacted solely for health and safety reasons and contrary to the state's economic interests?

2. Has Congress preempted state regulation through a statute expressly reaffirming the states' responsibility to manage low-level wastes?[1]

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[1]Petitioner does not contend before this Court that the State of Washington may regulate high-level radioactive waste storage and transportation or the lawful activities of the United States. These issues were addressed by the courts below.

Petitioner is Don't Waste Washington Legal Defense Foundation, a nonprofit Washington corporation affiliated with the Don't Waste Washington Committee, sponsor of Initiative 383. The other parties are: Washington State Building & Construction Trades Council, AFL-CIO; Washington

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[1] (Cont.)

Voice of Energy; US Ecology, Inc.; Tri-City Nuclear Industrial Council; Tri-State Motor Transit Company; Precision Cast Parts Corporation; Northern States Power Company; Chem-Nuclear Systems, Inc.; John C. Spellman, Governor of Washington; Kenneth Eikenberry, Attorney General of Washington; Alan J. Gibbs, Secretary of the State of Washington; the State of Washington; United States of America.

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IN THE

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OCTOBER TERM 1982

DON'T WASTE WASHINGTON LEGAL
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OPINIONS BELOW

The District Court for the Eastern District of Washington, McNichols, J., granted summary judgment to respondents and held Initiative 383 unconstitutional. 518

F. Supp. 928 (1981). The Court of Appeals for the Ninth Circuit, Goodwin, J., affirmed. 684 F.2d 627 (1982).

BASIS FOR JURISDICTION

The decision of the Ninth Circuit was filed on August 17, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1), 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Commerce Clause (U.S. Const. Art. I, § 8, cl. 3), the Supremacy Clause (Art. VI), pertinent provisions of the Low-Level Radioactive Waste Policy Act (42 U.S.C. §§ 2021b-d), and Washington Initiatve 383 are set forth in the appendix to this petition.

STATEMENT OF THE CASE

A. Facts

In November, 1980, the voters of the State of Washington enacted Initiative Measure No. 383 ("383") prohibiting the

transportation and storage within Washington of radioactive waste produced outside the state. 684 F.2d at 629. Initiative 383 set forth findings, not challenged in the district court, that "radioactive wastes are highly dangerous, in that releases of radioactive materials and emissions into the environment are inimical to the health and welfare of the people of the State of Washington, and contribute to the occurrences of harmful diseases." 383, § 1(1).

Further findings in 383 establish that transportation and storage of radioactive wastes present a hazard to health and safety because of the ever-present risk of accident, § 1(2); that these hazards are magnified both by the long time that the wastes remain radioactive and by the increasing quantities of wastes transported to Washington for storage, § 1(1) and (3); and that accidental releases of radioactive

wastes into the environment may contaminate the air and water. § 1(4).

Ninety five percent of low-level waste stored in Washington originates in other states. 684 F.2d at 629.[2]

At the time of judgment below there were three commercial sites available in the United States for storage of low-level radioactive waste. These sites were Barnwell, South Carolina; Beatty, Nevada; and Richland, Washington. See United States Department of Energy, (Draft) Low-Level Radioactive Waste Management Report at 13-24 (Apr. 21, 1981) (this report ("DOE Report") was included in the

---

[2]Initiative 383 exempted from the scope of the prohibitions described above "medical waste", in recognition of the great benefits derived from the application of nuclear technology to the field of medicine, and the comparatively low risk accompanying wastes generated in such research. 383, §§ 2(2), 3 & 4. Also exempted are wastes stored pursuant to interstate compacts "for the regional storage of radioactive wastes." 383, § 6. A Northwest compact has been submitted to Congress for ratification. 684 F.2d at 630.

district court record). Three other sites which in the past were used for storage of low-level wastes had been closed. Id. Two of these sites have experienced problems with leaching of radioactive wastes and contamination of the environment. Id. at 15, 23-24. Concerns that similar leaching will contaminate the Columbia River were a major consideration in enactment of 383.

Subsequent to the Ninth Circuit's opinion, the Nevada Board of Health ordered the closing of the Beatty site within thirty days. This action leaves Richland as the only commercial waste site in the western United States. Previously, both Beatty and Barnwell had begun to limit the quantities of wastes accepted. DOE Report at 17, 21-22.

Only Richland continues as a site for unlimited storage. However, Governor Ray was required to close the Richland facility

temporarily in 1979 due to shippers' non-compliance with packaging and transportation regulations. DOE Report at 18. Similar action was required by the Governor of Nevada at the same time. Id. at 22.

B. Proceedings Below

On March 27, 1981, US Ecology, Inc., the operator of the low-level waste site at Richland, together with seven other plaintiffs filed suit under 28 U.S.C. §§ 1331 and 1337 seeking a declaration that 383 was unconstitutional. Shortly thereafter, the United States of America filed a similar suit, invoking 28 U.S.C. § 1345. The Governor of Washington and state officials charged with inspecting radioactive waste shipments and supervising the Richland site were named as defendants.

On May 15, 1981, petitioner filed timely motions to intervene in both actions. The district court denied the

motions "without prejudice" but allowed petitioner to appear as amicus curiae.

Plaintiffs in both actions filed motions for summary judgment, supported by affidavits, statements of material facts, and memoranda. The state defendants filed no affidavits or other evidence, instead stipulating to the facts submitted by plaintiffs.

The district court issued a memorandum decision granting summary judgment on June 26, 1981, holding that 383 violated both the Commerce and Supremacy Clauses. 518 F. Supp. 928. Petitioner and the State appealed to the Ninth Circuit, which consolidated the cases and expedited the hearing at petitioner's request. The Ninth Circuit ruled that the district court erred in denying petitioner's motion to intervene, 684 F.2d at 629-30, but affirmed the district court's decision on the merits. Id. at 630-32.

ARGUMENT IN SUPPORT OF PETITION

A. 383 is a Health and Safety Measure Consistent with the Commerce Clause

This petition presents an important question of constitutional law reserved by this Court's decision in Philadelphia v. New Jersey, 437 U.S. 617 (1978). There, the Court struck down a New Jersey statute closing scarce and valuable landfill space to out-of-state users, stating:

> There has been no claim here that the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible.

Id. at 629.

Washington voters explicitly determined, in findings not challenged below, that radioactive wastes are "highly dangerous," and the ever-present risk of accident posed by transportation and storage presents a serious hazard to health, safety and environment. 383, §§ 1(1), (2) & (4).

This case therefore poses the question not answered in Philadelphia v. New Jersey, whether the Commerce Clause precludes state prohibitions deemed essential to health and safety. In contrast to New Jersey's efforts to preserve a scarce resource for its own citizens, Washington has acted against its own economic interests by limiting waste disposal for health and safety purposes. Indeed, the State, which leases the Richland site to US Ecology and collects substantial user fees and business taxes from operation of the site, 684 F.2d at 629, submitted no evidence in defense of 383.

The court of appeals clearly erred in dismissing the stated health and safety justifications in 383 as a mere "incantation" entitled to no deference. 684 F.2d at 631. The burden was on those challenging 383 to demonstrate that the asserted safety justifications were illusory. See

Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 443 (1978); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 585 (1978) (fundamental policy questions resolved in legislative process are not subject to reexamination in federal courts).

In accepting respondents' contention that 383 was impermissible "economic isolationism," 684 F.2d at 631, the court of appeals failed to recognize that 383 is contrary to the state's economic interests. The validity of legislation excluding "highly dangerous" wastes whose "very movement . . . endangers health" requiring disposal "as close to its point of generation as possible" was reserved for another day in Philadelphia v. New Jersey.

The serious dangers presented by radioactive wastes are compounded by the absence of an adequate waste disposal technology and policy to cope with the ever

increasing quantities of the wastes. See Pacific Legal Foundation v. State Energy Resources Conservation & Development Comm'n, 659 F.2d 903 (9th Cir. 1981), cert. denied, 102 S. Ct. 2959 (1982); Lucas, Nuclear Waste Management: A Challenge to Federalism, 7 Ecol. L.Q. 917, 917-18 & nn. 1-4 (1979); Tribe, California Declines the Nuclear Gamble: Is Such a State Choice Preempted?, 7 Ecol. L.Q. 679, 709 (1979).

While ninety five percent of radioactive waste in Washington originates from other states, forty eight other states now refuse to provide storage for any wastes. Lucas, supra at 919 & n.6; DOE Report at 13-24. This abdication of responsibility by the other states has left Washington as the major recipient of radioactive wastes in the nation, thereby magnifying the risk to health, safety, and environment in Washington.

Under these circumstances, an absolute ban on transportation and storage of radioactive wastes would have been amply justified. However, in contrast to most other states, Washington recognized its responsibility to manage the wastes generated within the state, a responsibility confirmed subsequently by Congress. 42 U.S.C. § 2021d(a)(1)(A). Again acting in advance of congressional policy, Washington provided for regional storage of wastes as an appropriate alternative to separate management in each of the fifty states. See 383, § 6; 42 U.S.C. § 2021d(a)(1)(B).

The effect of the decisions below is to require Washington to accept low-level waste solely because it already has a waste site. The decision appears to excuse other states from sharing the risks and burdens. The Commerce Clause does not require a state to stand by helplessly as these risks increase. In effect, the courts below

have penalized Washington for refusing to join 48 other states in abdicating their responsibility.

This Court has recognized that a state may exclude articles whose "worth in interstate commerce was far outweighed by the dangers inhering in their very movement." Philadephia v. New Jersey, supra at 622. The practical effect of state legislation is "the principal focus of inquiry" in determining whether such legislation impermissibly burdens interstate commerce. Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35-37 (1980). Respondents failed entirely to demonstrate that 383 will have more than an incidental impact on interstate commerce. No evidence was offered to show that low-level waste can be stored only in Washington.

Instead, respondents speculated that 383 will hinder the development and use of nuclear power. This assertion, wholly

unsupported by the record below, is at odds with the nuclear industry's contention that waste management issues are unrelated to the use of nuclear technology. Lucas, supra at 918. Behind respondents' inconsistent position is a desire to defer development of a national waste management policy solely at the risk of Washington residents.

This Court has employed a balancing approach in Commerce Clause cases, upholding state laws which serve a "legitimate local purpose" and employ the least discriminatory means available to achieve that purpose. Hughes v. Oklahoma, 441 U.S. 332, 336 (1979). The Court has recognized that safety is the highest purpose a state can assert as a counterbalance to a burden on interstate commerce. Raymond Motor Transportation, Inc. v. Rice, supra at 443; Hughes v. Oklahoma, supra at 337.

Where intended safety benefits are not illusory or insubstantial, federal courts must defer to the state's lawmakers on the appropriate balance to be struck against other interests. Kassel v. Consolidated Freight Corp., 101 S. Ct. 1309, 1321 (1981) (Brennan, J., with Marshall, J., concurring in the judgment); Minnesota v. Cloverleaf Creamery Company, 101 S. Ct. 715, 724-25 (1981). The courts below failed to give any deference to Washington's lawmakers' efforts to protect against the dangers of radioactive wastes. E.g., 518 F. Supp. at 934.

Washington has accepted responsibility for its own wastes, consistent with federal policy, 42 U.S.C. § 2021d(a)(1)(A), has made the Richland site available for regional storage, and will continue to accept wastes generated in medical research from any part of the country. Initiative 383 reflects the state's judgment as to the

least discriminatory means available to protect its citizens against the "ever-present risk" of nuclear accident. 383, § 1(2) & (4).

B. 383 is Not Preempted by Federal Law

The court of appeals departed from this Court's standards by implying preemption of 383 in the Low-Level Waste Policy Act, 42 U.S.C. §§ 2021b-d. Implied preemption is disfavored as an invitation to Congress to avoid making difficult political decisions in reliance on the courts. Such decisions are not the proper role of the courts. See Tribe, supra at 690.

The Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-d, enacted one month after 383, is Congress' most specific and most recent legislation addressing low-level wastes. The act established federal policy:

> (A) each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders except for waste generated as a result of defense activities of the Secretary or Federal research and development activities; and
>
> (B) low-level radioactive waste can be most safely and efficiently managed on a regional basis.

The Low-Level Waste Act encouraged formation of interstate compacts for regional waste management, 42 U.S.C. § 2021d(a)(2)(A), while planning for "interim storage" of commercial wastes at federal sites. Id. § 2021d(b)(1)(D).

Washington is one of the only states actively carrying out the federal policy of providing capacity for its own waste, having sub-leased and licensed the Richland site. 684 F.2d at 629. Washington also pioneered regional management through the Northwest compact, id. at 630, thereby fulfilling the second stated federal policy.

The Act confirmed Congress' respect for state authority to exclude low-level waste by planning for interim storage of commercial waste at federal faciliites. 42 U.S.C. § 2021d(b)(1)(D). The Act's legislative history clearly confirms this intent.

The clearest expression of congressional intent was the explicit confirmation by Senator McClure, a co-sponsor of the Low-Level Waste Act, that the Act would not require states to accept wastes from other states. 126 Cong. Rec. S16543 (Dec. 13, 1980). Senator Thurmond confirmed Congress' understanding of the existing federal-state relationship. After referencing the recent enactment of 383 in Washington, the Senator stated:

> I wish to leave the responsibility for handling this problem where it rightfully belongs -- with the individual states.

Id. at S16544. See also 126 Cong. Rec. H12496 (Dec. 13, 1980) (House co-sponsor characterizing recent actions by site states including 383 as "responsible").

Had Congress intended preemption in its most specific and recent act addressing low-level wastes, it surely would have done more than tell the states to find storage capacity. Senate leaders believing the field already preempted would not "leave the responsibility . . . with the individual States." Nor would a co-sponsor of preemptive legislation provide the confirmation requested by a colleague that his state could prohibit "another State in another part of the country from putting its waste within that State." 126 Cong. Rec. S16543 (Dec. 13, 1980).

The finding of preemption by the courts below is contrary to the principles of federalism established by this Court's decisions. State laws are preempted only

if there is an "irreconcilable conflict" with federal law, or where the "clear and manifest purpose of Congress" to preempt is evident. Florida Lime & Avocado Growers v. Paul, 383 U.S. 132, 146 (1963). Preemption is not to be inferred merely from the existence of comprehensive federal law in the field. New York State Department of Social Services v. Dublino, 413 U.S. 405, 415 (1973). The Court has stated:

> Only a demonstration that complete ouster of state power--including state power to promulgate laws not in conflict with federal laws--was "the clear and manifest purpose of Congress" would justify that conclusion.

DeCanas v. Bica, 424 U.S. 351, 357 (1976). See also Pacific Legal Foundation, supra (state laws "zoning" nuclear power plants upheld).

The principle that preemption will not be presumed lightly is especially forceful in its application to state health and

safety laws. Brotherhood of Locomotive Engineers v. Chicago, Rock Island, & Pacific R.R., 383 U.S. 423 (1966). See also Philadelphia v. New Jersey, supra at 620-21 n.4 (declining to find preemption in management of solid wastes); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (recognizing historical police power in fields traditionally occupied by the state).

This policy of judicial restraint recognizes the ultimate authority of Congress to establish the federal-state balance, while preserving essential state authority to the extent consistent with federal law. The courts below cut off state authority clearly in advance of congressional resolution of the issue.

CONCLUSION

The courts below have deprived Washington of its power to exclude dangerous substances, extending application of the Commerce Clause to wastes whose very movement endanger health. Their decision invaded Congress' authority to delineate state and federal roles in low-level waste management. The courts have answered questions reserved for Congress, and may well have reached a result opposite from that intended by Congress.

The Court should grant the petition and address the important constitutional issues raised by the state's efforts to address a too long ignored critical health and safety issue.

DATED this ___ day of November, 1982.

Respectfully submitted,
BRICKLIN & GENDLER

MICHAEL W. GENDLER
Counsel of Record for Petitioner
Don't Waste Washington Legal
Defense Foundation

APPENDIX

The Constitution of the United States reads in pertinent part:

Article I, Section 8:

> The Congress shall have Power ***
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes:

Article VI.

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Low-Level Radioactive Waste
Policy Act
Title 42 U.S.C.

Sec. 2, As used in this Act--

(2) The term "low-level radioactive waste" means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in section 11e.(2) of the Atomic Energy Act of 1954.

LOW-LEVEL RADIOACTIVE WASTE DISPOSAL

Sec. 4. (a)(1) It is the policy of the Federal Government that--

(A) each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders except for waste generated as a result of defense activities of the Secretary

or Federal research and development activities; and

(B) low-level radioactive waste can be most safely and efficiently managed on a regional basis.

(2)(A) To carry out the policy set forth in paragraph (1), the States may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste.

(B) A compact entered into under subparagraph (A) shall not take effect until the Congress has by law consented to the compact. Each such compact shall provide that every 5 years after the compact has taken effect the Congress may by law withdraw its consent. After January 1, 1986, any such compact may restrict the use of the regional disposal facilities under the compact to the disposal of

low-level radioactive waste generated within the region.

(b)(1) In order to assist the States in carrying out the policy set forth in subsection (a)(1), the Secretary shall prepare and submit to Congress and to each of the States within 120 days after the date of the enactment of this Act a report which--

(A) defines the disposal capacity needed for present and future low-level radioactive waste on a regional basis;

(B) defines the status of all commercial low-level radioactive waste disposal sites and includes an evaluation of the license status of each such site, the state of operation of each site, including operating history, an analysis of the adequacy of disposal technology employed at each site to contain

low-level radioactive wastes for their hazardous lifetimes, and such recommendations as the Secretary considers appropriate to assure protection of the public health and safety from wastes transported to such sites;

(C) evaluates the transportation requirements on a regional basis and in comparison with performance of present transportation practices for the shipment of low-level radioactive wastes, including an inventory of types and quantities of low-level wastes, and evaluation of shipment requirements for each type of waste and an evaluation of the ability of generators, shippers, and carriers to meet such requirements; and

(D) evaluates the capability of the low-level radioactive waste

disposal facilities owned and operated by the Department of Energy to provide interim storage for commercially generated low-level waste and estimates the costs associated with such interim storage.

(2) In carrying out this subsection, the secretary shall consult with the Governors of the States, the Nuclear Regulatory Commission, the Environmental Protection Agency, the United States Geological Survey, and the Secretary of Transportation, and such other agencies and departments as he finds appropriate.

COMPLETE TEXT OF
Initiative Measure 383

AN ACT Relating to radioactive waste; prohibiting the storage of certain radioactive waste in Washington state; creating a new chapter in Title 70 RCW; and providing penalties.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. The people of the state of Washington find that:

(1) Radioactive wastes are highly dangerous, in that releases of radioactive materials and emissions to the environment are inimical to the health and welfare of the people of the state of Washington, and contribute to the occurrences of harmful diseases, including excessive cancer and leukemia. The dangers posed by the transportation and presence of radioactive wastes are increased further by the long time periods that the wastes remain radioactive and highly dangerous;

(2) Transporting, handling, storing, or otherwise caring for radioactive waste presents a hazard to the health, safety, and welfare of the individual citizens of the state of Washington because of the ever-present risk that an accident or incident will occur while the wastes are being cared for;

(3) The likelihood that an accident will occur in this state involving the release of radioactive wastes to the environment becomes greater as the volume of wastes transported, handled, stored, or otherwise cared for in this state increases;

(4) The effects of unplanned releases of radioactive wastes into the environment, especially into the air and water of the state, are potentially both widespread and harmful to the health, safety, and welfare of the citizens of this state.

The burden and hazards posed by increasing the volume of radioactive wastes transported, handled, stored, or otherwise cared for in this state by the importation of such wastes from outside this state is not a hazard the state government may reasonably ask its citizens to bear. The people of the state of Washington believe that the principles of federalism do not require the sacrifice of the health, safety, and welfare of the people of one state for the convenience of other states or nations.

NEW SECTION. Sec. 2. The definitions set forth in this section apply throughout this chapter.

(1) "Radioactive waste" means unwanted radioactive material, including radioactive residues produced as a result of electric power generation or other reactor operation.

(2) "Medical waste" means radioactive waste from all therapy, diagnosis, or research in medical fields and radioactive waste which results from the production and manufacture of radioactive material used for therapy, diagnosis, or research in medical fields, except that "medical waste" does not include spent fuel or waste from the fuel of an isotope production reactor.

(3) "Radioactive waste generated or otherwise produced outside the geographic boundaries of the state of Washington" means radioactive waste which was located outside the state of Washington at the time of removal from a reactor vessel.

NEW SECTION. Sec. 3. Notwithstanding any law, order, or regulation to the contrary, after July 1, 1981, no area within the geographic boundaries of the state of Washington may be used by any person or entity as a temporary, interim, or permanent storage site for radioactive

waste, except medical waste, generated or otherwise produced outside the geographic boundaries of the state of Washington. This section does not apply to radioactive waste stored within the state of Washington prior to July 1, 1981.

NEW SECTION. Sec. 4. Notwithstanding any law, order, or regulation to the contrary, after July 1, 1981, no person or entity may transport radioactive waste, except medical waste, generated or otherwise produced outside the geographic boundaries of the state of Washington to any site within the geographic boundaries of the state of Washington for temporary, interim, or permanent storage.

NEW SECTION. Sec. 5. (1) A violation of or failure to comply with the provisions of section 3 or 4 of this act is a gross misdemeanor.

(2) Any person or entity that violates or fails to comply with the provisions of

sections 3 or 4 of this act is subject to a civil penalty of one thousand dollars for each violation or failure to comply.

(3) Each day upon which a violation occurs constitutes a separate violation for the purposes of subsections (1) and (2) of this section.

(4) Any person or entity violating this chapter may be enjoined from continuing the violation. The attorney general or any person residing in the state of Washington may bring an action to enjoin violations of this chapter, on his or her own behalf and on the behalf of all persons similarly situated. Such action may be maintained in the person's own name or in the name of the state of Washington. No bond may be required as a condition to obtaining any injunctive relief. The superior courts have jurisdiction over actions brought under this section, and venue shall lie in the county of the

plaintiff's residence, in the county in which the violation is alleged to occur, or in Thurston county. In addition to other relief, the court in its discretion may award attorney's and expert witness fees and costs of the suit to a party who demonstrates that a violation of this chapter has occurred.

NEW SECTION. Sec. 6. Notwithstanding the other provisions of this chapter, the state of Washington may enter into an interstate compact, which will become effective upon ratification by a majority of both houses of the United States Congress, to provide for the regional storage of radioactive wastes.

NEW SECTION. Sec. 7. This chapter shall be liberally construed to protect the health, safety, and welfare of the individual citizens of the state of Washington.

NEW SECTION. Sec. 8. If any provision of this act or its application

to any person or circumstances is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 9. This act may be known as the Radioactive Waste Storage and Transportation Act of 1980.

NEW SECTION. Sec. 10. Sections 1 through 9 of this act shall constitute a new chapter in Title 70 RCW.

WASHINGTON STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., Plaintiffs-Appellees,

v.

The Honorable John C. SPELLMAN, Governor of the State of Washington, et al., Defendants-Appellants.

UNITED STATES of America, Plaintiff-Appellee,

v.

STATE OF WASHINGTON, et al., Defendants-Appellants.

WASHINGTON STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., Plaintiffs-Appellees,

v.

The Honorable John C. SPELLMAN, et al., Defendants,

and

Don't Waste Washington Legal Defense Foundation, Intervenor-Defendant-Appellant.

UNITED STATES of America, Plaintiff-Appellee,

v.

STATE OF WASHINGTON, et al., Defendant,

and

Don't Waste Washington Legal Defense Foundation,
Intervenor-Defendant-Appellant.

Nos. 81-3453, 81-3454, 81-3460 and 81-3461.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 5, 1982.
Decided Aug. 17, 1982.

Suit challenging constitutionality of Washington statute prohibiting transportation and storage within state of radioactive waste produced outside state was brought. The United States District Court for the Eastern District of Washington, Robert J. McNichols, Chief Judge, 518 F.Supp. 928, found the statute unconstitutional, and appeal was taken. The Court of Appeals, Goodwin, Circuit Judge, held that the statute violated both the supremacy and the commerce clauses.

Affirmed.

1. Federal Civil Procedure 331

In action challenging constitutionality of Washington statute prohibiting importation of low-level radioactive waste originating outside state, public interest group that sponsored statute as initiative measure was entitled to intervene as matter of right. Fed. Rules Civ. Proc. Rule 24(a), 28 U.S.C.A.

2. States 4.10, 6

Washington statute closing borders of state to entry of low-level radioactive waste orginating outside state violated supremacy clause since it sought to regulate legitimate federal activity of disposing of such waste and since statute was not authorized by federal law permitting establishment and operation of regional disposal facilities through interstate compacts because it was not framed in terms of compact and because compact had not been

approved by Congress. U.S.C.A. Const. Art. 6, cl. 2; Atomic Energy Act of 1954, § 274, 42 U.S.C.A. § 2021; Low-Level Radioactive Waste Policy Act, § 2 et seq., 42 U.S.C.A. § 2021b et seq.

3. Commerce 52.10, 61(1)

Washington statute prohibiting transportation and storage within state of radioactive waste produced outside state was unconstitutional as violation of commerce clause since Congress had established pervasive statutory scheme to regulate nuclear activity. U.S.C.A. Const. Art. 1, § 8, cl. 3; Atomic Energy Act of 1954, § 274, 42 U.S.C.A. § 2021; Low-Level Radioactive Waste Policy Act, § 2 et seq., 42 U.S.C.A. § 2021b et seq.

4. Commerce 12

Even in absence of pervasive federal legislation, commerce clause prevents states from erecting barriers to free flow

of interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

5. Commerce 12

State statute may affect commerce without violating commerce clause if statute serves legitimate state interest and if it is applied in nondiscriminatory manner. U.S.C.A. Const. Art. 1, § 8, cl. 3.

6. Commerce 13.4, 54

Criteria for determining whether commerce clause has been violated is whether state law regulates evenhandedly, accomplishes legitimate local public purpose, and has only incidental effect on interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

Michael B. Crutcher, Seattle, Wash., argued for Washington State Bldg. et al., W. Russell Daggatt, Catherine B. Roach,

Roberta R. Katz, Preston, Thorgrimson, Ellis & Holman, Seattle, Was., on brief.

Michael Hanbey, Asst. Atty. Gen., Olympia, Wash., argued for Spellman, et al.; Kenneth O. Eikenberry, Atty. Gen., Kenneth M. MacIntosh, Asst. Atty. Gen., Olympia, Wash., on brief.

Michael W. Gendler, Seattle, Wash. for amicus curiae.

Appeal from the United States District Court for the Eastern District of Washington.

Before GOODWIN and POOLE, Circuit Judges, and EAST*, District Judge.

GOODWIN, Circuit Judge

The district court granted summary judgment in favor of the United States and certain commercial users of a low-level

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

radioactive waste disposal site in the State of Washington. The decision, reported at 518 F.Supp. 928 (E.D. Wash. 1981), struck down as unconstitutional a Washington statute closing the borders of Washington to the entry of low-level radioactive waste originating outside the state. Don't Waste Washington (DWW), a public interest group which had sponsored the challenged initiative legislation, appeals the denial of leave to intervene as a party. The State appeals the summary judgment.

For more than fifteen years, the State of Washington has leased from the United States 1,000 acres in an area known as the Hanford Reservation. During this time, the State has sub-leased part of the land for use as a commercial low-level radioactive waste dump. By arrangement with the United States under § 274 of the Atomic Energy Act (42 U.S.C. § 2021), Washington monitors the

dumping site (Richland) and inspects shipments of waste to determine their compliance with state and federal regulations concerning radioactive material. The State also licenses users and collects a fee from them.

Richland is one of three low-level radioactive dump sites in operation nationwide and receives about 40 percent of the country's low-level radioactive waste. It is also the only currently operating site accepting absorbed-liquid low-level radioactive waste. Approximately 95 percent of the waste received bv Richland originates outside the State of Washington.

In November 1980, the voters of the State of Washington enacted Initiative Measure No. 383 ("383") prohibiting the transportation and storage within Washington of radioactive waste produced outside the state. The initiative also gave permission for the state to enter into an

interstate compact to solve the problem of radioactive waste on a regional basis. Federal legislation had already provided for military and high level radioactive wastes.

After the Washington initiative was approved by the voters, Congress passed the Low-Level Radioactive Waste Policy Act of 1981 (Pub.L. No. 96-573, 94 Stat. 3347, hereinafter referred to as the "Low-Level Waste Act") encouraging the use of compacts between and among states to accomplish regional storage of low-level radioactive waste. At the time the Low-Level Waste Act was passed, Congress was aware of the enactment of 383 in Washington.

The operator of the site, together with seven other plaintiffs, filed an action in district court seeking a declaration that 383 was unconstitutional and requesting injunctive relief. Shortly

afterward, the United States of America filed a similar action.

The parties concede that regulation of the disposal of high-level radioactive waste has been preempted by the federal government and that this area is therefore not susceptible to regulation by the states. The dispute concerns the power of a state to regulate within its borders the importation and disposal of low-level radioactive waste such as filter sludges, resins, filter bottoms, used gloves and protective clothing, rags, tools, papers, plastic and material used in the manufacture of smoke detectors, luminous dials and emergency exit signs.

The government and the users of the Richland site attack the state statute on two grounds: (1) the Atomic Energy Act and the Low-Level Waste Act preempt state action; and (2) Measure 383 violates the Commerce Clause of the United States

Constitution. The State of Washington contends that § 274 of the Atomic Energy Act and the interstate compact provision of the Low-Level Waste Act cede control to the state over low-level waste disposal in general. The State also argues that 383 does not violate the Commerce Clause.

[1] DWW appeals the district court's denial of its motion to intervene either as a matter of right under Federal Rules of Civil Procedure 24(a), or under Rule 24(b)'s provision for permissive intervention.

Denial of DWW's motion to intervene was error and accordingly we reverse as to that holding. Rule 24 traditionally has received a liberal construction in favor of applicants for intervention. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1904 (1972). DWW, as the public interest group that sponsored the initiative,

was entitled to intervention as a matter of right under Rule 24(a). However, while we sustain DWW's appeal, this reversal does not require a new trial because the holding of the case would not be changed. DWW was permitted to participate in the argument on the appeal from the order granting summary judgment, and its contentions were duly considered. We conclude that the district court was correct in granting summary judgment to the plaintiffs. No genuine issue of fact exists. Initiative 383 violates the Supremacy Clause and the Commerce Clause of the United States Constitution.

1. Supremacy Clause

[2] The initiative violates the Supremacy Clause because it seeks to regulate legitimate federal activity and to avoid the preemption of the Atomic Energy Act. Neither § 274 of the Act nor the

Low-Level Waste Act is a grant of total authority to the states over the disposal of low-level wastes within their own borders.

The regulation of the disposal of low-level radioactive waste is a legitimate federal activity, and Congress has not waived or delegated its authority over the subject. The United States' § 274 agreement with the State of Washington gives the State authority over such matters as licensing, inspection, and levying of lease and maintenance fees. However, as the district court correctly points out, complete control of the Richland site did not pass with the assignment of regulatory responsibilities.

The Low-Level Waste Act comes closer to yielding control of disposal sites to the states in which the sites are located. The Act permits the establishment and operation of regional disposal facilities

through interstate compacts. Because Congress specifically gives permission for regional disposal in this Act, states signatory to a compact could exclude waste from nonsignatory states without violating the Supremacy or Commerce Clauses. Permission to exclude such wastes, however, is conditioned on participation in a compact.

The State of Washington has signed the proposed Northwest Interstate Compact on Low-Level Radioactive Waste Management (Northwest Compact) with Oregon, Idaho, Montana and Utah. As of this date, the proposed compact has not received Congressional approval. Until the state participates in a compact which has become law, the Low-Level Waste Act does not grant power to any state to close its borders to interstate traffic in low-level waste.

In any case, Initiative 383 was not framed in terms of the Northwest Compact. It was an unqualified closing of the

Richland facility to all out-of-state users. As such, it violates the Supremacy Clause.

II. Commerce Clause

[3] Initiative 383 also violates the Commerce Clause. The initiative is based upon an impermissible exercise of the State of Washington's police powers. Congress has established in the Atomic Energy Act a pervasive statutory scheme to regulate nuclear activity. As discussed above, through § 274 of the Act and through the Low-Level Waste Act, Congress has also ceded some regulatory authority to the states. But Congress stopped short of granting the states power to ban wastes transported from outside their borders.

[4,5] Even in the absence of pervasive federal legislation, "the Commerce Clause prevents the States from erecting barriers to the free flow of interstate commerce." Raymond Motor Transportation, Inc. v. Rice,

434 U.S. 429, 440, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978). A state statute may affect commerce without violating the Commerce Clause, however, if the statute serves a legitimate state interest and if it is applied in a nondiscriminatory manner. Id.

[6] The criteria for determining whether the Commerce Clause has been violated are articulated in Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). The Pike test asks whether the state law (1) regulates evenhandedly; (2) accomplishes a legitimate local public purpose; and (3) has only an incidental effect on interstate commerce.

Low-level waste from within Washington and that traveling through the state are exempted from the initiative. Only out-of-state waste bound for disposal with Washington is banned. Such uneven treatment of

in-state and out-of-state parties fails the first part of the Pike test.

This facial discrimination, in turn, "invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatoary alternatives." Hughes v. Oklahoma, 441 U.S. 322, 337, 99 S.Ct. 1727, 1737, 60 L.Ed.2d 250 (1979). The initiative cannot withstand this level of scrutiny.

A challenge to bona fide safety regulations must overcome a strong presumption of validity. Bibb v. Navajo Freight Lines, 359 U.S. 520, 524, 79 S.Ct. 962, 964, 3 L.Ed.2d 1003 (1959). However, the Supreme Court has recently held that "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670, 101 S.Ct. 1309, 1316, 67 L.Ed.2d 580 (1981).

The state relies upon the proposition that "releases of radioactive materials and emissions to the environment are inimical to the health and welfare of the people of Washington . . . ." Initiative 383, § 1. Undoubtedly, the release of radioactive materials and emissions is inimical to the safety of the people of any state. The State of Washington neglects to address, however, the manner in which local waste, transported and stored within Washington has superior safety and environmental virtues over waste produced elsewhere and similarly controlled by state regulatory measures. Initiative 383, therefore, also fails the second part of the Pike test.

Finally, Initiative 383 has more than an incidental effect on interstate commerce. Washington receives two-fifths of the country's low-level radioactive waste and has the only site currently available to receive absorbed-liquid low-level waste.

Closing Washington's borders would significantly aggravate the national problem of low-level waste disposal. Thus, 383 fails to meet the last part of the Pike test and violates the Commerce Clause.

Further, 383 fails to qualify under either the market participant or quarantine theory exceptions to the Commerce Clause. The State's contention that it is a "market participant," thereby placing the initiative beyond the reach of the Commerce Clause, is unconvincing. The State argues that 383 is a proprietary measure enacted to limit the state's participation in the waste disposal market. Whether or not the State is a proprietor of the Richland site, the initiative is cast in state regulatory rather than in proprietary terms. The measure is based on public safety rather than on economic considerations. The measure denies entry of waste at the state's borders rather than at the site the

State is operating as a market participant. The measure establishes civil and criminal penalties which only a state and not a mere proprietor can enforce.

The State's quarantine theory is equally unconvincing. Under the quarantine theory, a state may close its borders to protect citizens against health hazards such as epidemics.

In Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), however, the Supreme Court held that one state may not "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." Id. at 628, 98 S.Ct. at 2538. In that case, the out-of-state user of a New Jersey disposal site challenged a New Jersey statute prohibiting the importation of out-of-state waste. The New Jersey statute, like the Washington initiative, protected the health of the individual

MEMORANDUM DECISION

ROBERT J. McNICHOLS, Chief Judge.

The plaintiffs in these cases challenge the constitutionality of Washington's Radioactive Waste Storage and Transportation Act Measure No. 383 (Initiative). Since the plaintiffs' motions for summary judgment rest on substantially similar grounds, their motions were joined for purposes of argument.

One of the plaintiffs, U.S. Ecology, Inc. operates one of the three active commercial nuclear waste disposal sites in the United States. It provides disposal services to the United States, various state governments and numerous commercial users throughout the country. The United States, in addition to being a substantial user of the commercial facility, also maintains its own disposal sites in Washington.

The defendant (State) by the Initiative, seeks to effectively ban the storage of all non-medical radioactive waste (waste) generated outside the State of Washington. The Initiative also bans the transportation of such waste to any storage site in Washington. The stated purpose of the Initiative was to protect the health and safety of the citizens of Washington. Although the State contends that the provision in the Initiative for an interstate compact might remove any impermissible ban on interstate commerce, the Initiative Compact Section does not provide a timely or effective exception to the ban.

The Initiative does not ban the transportation for storage or the storage of waste generated in Washington. Nor does it ban the transportation of radioactive material through Washington for use or

storage elsewhere. Consequently, the Initiative suggests that the perceived harms caused by the waste occur after its disposal in the storage sites.

The plaintiffs jointly contend that the Initiative violates the Commerce Clause, U.S.Const., Art. 1, § 8, cl. 3 and that under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, it has been pre-empted by federal law. (Atomic Energy Act, 42 U.S.C. §§ 2011 et seq.; Low-Level Radioactive Waste Policy Act, Pub.L.No. 96-573 (Dec. 23, 1980); Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801 et seq.). In addition, the United States contends that the Initiative violates the War Power and Property Clauses of the United States Constitution. With respect to the Commerce Clause, the State contends that the Initiative is valid as an action of a market participant or as a proper exercise of the State's police powers.

With respect to the Supremacy Clause, the State contends that the Initiative has not been preempted by federal law. I hold that the Initiative is unconstitutional and thus not enforceable.

FACTS

This controversy centers on the transportation to and storage of nuclear waste on the Hanford Reservation. This federal reservation consists of 562 square miles of land and facilities in and around Benton County, Washington. Since 1943, the reservation has been used for federal nuclear programs.

There are three storage areas on the reservation. The first two areas are owned and operated by the federal government. The first area provides storage for waste generated from federal energy programs and national defense activities. The second area contains a near-surface test facility

which is designed to test the feasibility of storing spent fuel and high-level waste in underground basalt formations. The third area arose out of a lease of approximately 1000 acres by the United States to the State of Washington. The State of Washington subleased approximately 100 of those acres to U.S. Ecology, Inc. for the operation of a low-level radioactive waste storage facility. Although there are two other active commercial facilities in the United States, the U.S. Ecology, Inc. site is the only existing commercial facility which can store absorbed low-level radioactive liquids.

The commercial site is licensed for its current activity by the State of Washington. The site is regulated under State and Federal regulations pertaining to atomic energy and health and environmental

protection. The United States Department of Transportation regulates the transportation of the radioactive waste.

The low-level radioactive waste problem is of national concern. S.Rep. No. 548, 96th Cong. (1980), reprinted in U.S.Code Cong. & Ad. News 11230. The latest Department of Energy statistics indicate commercial facilities generated over three million cubic feet of low-level waste in 1980. Low-Level Radioactive Waste Management Report (Draft Report, April 21, 1981). By 1985, the figure is expected to increase to over five and a half million cubic feet per year. Id.

The commercial storage facility on the Hanford Reservation is a key facility in the nation's waste disposal program. Specifically, it is the only commercial storage site which can store "absorbed low-level radioactive liquids." Moreover,

it accepted approximately twenty-seven percent (27%) of the total waste in 1980. While a site in Barnwell, South Carolina has been accepting more than fifty percent (50%) of the generated waste, a South Carolina "volume limitation program" will cut that site's capacity to less than twenty-five percent (25%) of the waste generated in 1985.

The facts of this case present a classic supply and demand problem. It is clear that there is a serious national problem with the increasing volume of waste, which must be stored somewhere, and a nearly simultaneous reduction of the already limited storage capacity. Congress has recognized this problem and taken steps to solve it to the end that a few states will not continue to bear the waste of many. If the Initiative were permitted to stand it would aggravate an already critical situation.

DISCUSSION

The Initiative is invalid for two reasons: it violates the Supremacy Clause and the Commerce Clause of the United States Constitution.

[1,2] The Initiative violates the Supremacy Clause because it seeks to regulate legitimate federal activity, and because it has been preempted by federal law.

If the Initiative seeks to regulate the transportation for storage and storage of all federal waste generated outside the State of Washington and the operations of the federal storage facility, the Initiative violates the Supremacy Clause. U.S. Const. Art. VI, cl. 2. Since defendants' counsel are unable to represent that the Initiative did not apply against the federal government, I must, in light of the Initiative's clear language, assume that it

does purport to apply to the federal government. Therefore, I am compelled to find that, to the extent that it is applicable to the United States government, the Initiative, in the absence of an express Congressional waiver of sovereignty, is unconstitutional. Hancock v. Train, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976); Mayo v. United States, 319 U.S. 441, 63 S.Ct. 1137, 87 L.Ed. 1504 (1943).

The doctrine of federal preemption has its roots in the Supremacy Clause. The issue is whether the federal government has preempted the state regulation of high-level and low-level radioactive wastes.

Since preemption may be demonstrated in either of two ways, my function is to determine: (1) Whether there is evidence (pervasive federal scheme or dominant federal interest) that Congress intended to supersede the police powers of the State,

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947) or (2) Whether the Initiative "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 58 L.Ed. 581 (1941).

By reviewing the pervasive federal statutory schemes for the regulation of radioactive waste, the Atomic Energy Act, the Low-Level Radioactive Waste Policy Act and the Hazardous Materials Transportation Act, and applying established judicial reasoning, I am convinced that Congress intended that the transportation and storage of all materials which pose radiation hazards would be regulated by the federal government except where jurisdiction was expressly ceded to the states. Northern States Power Company v. State of Minnesota, 447 F.2d 1143 (CA 8 1971),

aff'd, 405 U.S. 1035, 92 S.Ct. 1307, 31 L.Ed.2d 576 (1972) (nuclear waste releases); Consolidated Rail Corporation v. City of Dover, 450 F.Supp. 966 (D.Del. 1978) (hazardous freight and toxic materials.)

The State concedes, and the most recent legislative history confirms the fact that Congress has not expressly ceded management of high-level radioactive waste. S.Rep.No. 548, 96th Cong. (1980), reprinted in U.S. Code Cong. & Ad.News 11231. Since it is clear that federal law preempts any state ban on high-level waste, the only remaining issue is whether Congress has expressly ceded regulation of low-level wastes.

In this case, there are two federal expressions which might be interpreted as a grant of such authority: (1) the Agreement between the United States Atomic Energy Commission and the State

of Washington pursuant to Section 274 of the Atomic Energy Act (42 U.S.C. § 2021), and (2) the Low-Level Radioactive Waste Policy Act, Pub.L. No. 96-573 (Dec. 23, 1980).

Although the Section 274 Agreement expressly ceded qualified regulatory responsibility over byproduct materials, source materials and special nuclear materials, it did not cede control over all low-level wastes. Also, the Agreement, by its terms, contemplates "that State and Commission programs for protection against hazards of radiation will be coordinated and compatible." Agreement at p. 2. Moreoever, the Agreement recognizes the desirability of reciprocal recognition of licenses. Agreement at p. 5. Furthermore, Congress granted the authority to regulate certain nuclear material. It did not grant the authority to effectively ban the receipt and disposal of such material.

Finally, the Initiative was expressly based upon the State's police power to protect the health, safety and welfare of the citizens of Washington State. It was not premised on the Section 274 Agreement.

Thus, neither the Agreement nor the statute which authorized it represent an express grant of the authority to the State to effectively ban the storage or transport of low-level radioactive waste.

The Low-Level Waste Policy Act, (Low-Level Act), does constitute a valid but limited grant of authority to effectively ban the storage of certain waste. The Low-Level Act is important for several reasons. First, it clearly excludes federal waste or facilities from any action taken under a regional compact.

Second, the Low-Level Act recognizes the particularly acute national problem of a high demand for storage and a dwindling supply of storage capacity. At the same

time, the Act recognizes that those states (Nevada, South Carolina and Washington) which provide the nation's entire commercial disposal system cannot be expected to continue to bear the burden of the other states' waste problems.

Thirdly, the Low-Level Act presents a rational and equitable approach for resolving the waste disposal problem. Each state is now responsible "for providing for the availability of capacity either within or outside the State" for low-level radioactive waste disposal. Section 4(a)(1)(A). The Low-Level Act recognizes that a regional approach affords the safest and most efficient management. Section 4(a)(1)(B). Congress has authorized the states to join interstate compacts to provide for regional disposal sites. Section 4(a)(2)(A). These compacts are subject to approval by Congress. After January 1, 1986, any such regional compact may preclude disposal of

extra-regional waste in the compact's regional sites. Section 4(a)(2)(B).

The State's argument that Congress, by this statute, ceded complete authority to regulate is not persuasive because the statute merely makes each state "responsible for providing for the availability of capacity."

The State contends that the Federal Low-Level Waste Act does not preclude the State from presently banning the importation of waste. Such an interpretation of the statute is strained. Congress has authorized the State to enter into interstate compacts. After such compacts are approved by Congress, the regions established thereby may exclude waste from without the region after January 1, 1986 or at such other times as Congress may authorize.

A close reading of the statute and the legislative history reveals a Congressional

plan to place future responsibility on the individual states to dispose of their waste. To encourage individual state action, Congress made it clear to all states that if they did not make provision for their own waste by January 1, 1986, they could be denied access to other regions' disposal sites. At the same time, Congress recognized that the organization of regional compacts and construction of disposal sites would take time. Consequently, Congress expressly delayed any authorized ban on radioactive waste until January 1, 1986. If I were to adopt the contentions that Washington may ban waste today, the State of Washington would obstruct the efforts of Congress toward an orderly resolution of a significant national problem.

For the aforementioned reasons, the Initiative cannot withstand scrutiny under the Supremacy Clause.

COMMERCE CLAUSE

The plaintiffs contend that the Initiative violates the Commerce Clause, U.S.Const., Art. 1, § 8, cl. 3, because it discriminates against and interferes with interstate commerce. The State contends that the Initiative does not violate the Commerce Clause because: (1) the interstate movement of radioactive waste, unlike other substances, is not "commerce" within the meaning of the Commerce Clause; (2) the state is acting as a market participant; and (3) the Initiative is based upon a permissible exercise of the state's police powers.

[3] Both a common sense view of the facts and the principle that "[a]ll objects of interstate trade merit Commerce Clause protection; none [are] excluded by definition at the outset[,]" Philadelphia v. New Jersey, 437 U.S. 617, 622, 98

S.Ct. 2531, 2534, 57 L.Ed.2d 475 (1978), (solid or liquid waste), support a determination that the movement of radioactive waste in interstate commerce fits within the definition of "commerce" for constitutional purposes.

[4] The State's contention that the Initiative merely reflects the action of a "market participant" and that as such the Initiative is beyond the reach of the Commerce Clause is not persuasive. The Initiative is not a proprietary measure. The clear language of the Initiative establishes that it is a regulatory measure. It purports to effectively ban the transport for storage and the storage of certain material. It establishes civil and criminal penalties for violations. Moreover, the Initiative is based on a perceived need to protect the health and safety of the citizens of Washington. It is not based on economics or other factors

traditionally associated with proprietary measures. Finally, the State, as a lessor, is engaged in the rental business. The real proprietors are the United States government as an operator of two federal sites and U.S. Ecology, Inc., as the operator of the commercial site. Having determined that the movement of radioactive waste is "commerce" and that the State is not a "market participant", I must now determine whether the Initiative is permissible as an exercise of Washington's police power. I hold that the State of Washington, through the Initiative, has exceeded its police powers.

[5-8] Unlike the situation in South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 (1938), Congress has established a pervasive statutory scheme, in this case, to regulate nuclear activity. Although Congress has ceded some

of this authority to the states, it has not granted the states the power to effectively ban the transportation for storage or the storage of radioactive waste generated outside Washington. In the presence of such pervasive federal legislation, the Initiative must be invalidated. Campbell v. Hussey, 368 U.S. 297, 82 S.Ct. 327, 7 L.Ed.2d 299 (1961) (supplemental state tobacco regulation).

Even in the absence of federal legislation, "the Commerce Clause prevents the States from erecting barriers to the free flow of interstate commerce." Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 440, 98 S.Ct. 787, 793, 54 L.Ed.2d 664 (1978). However, a state statute which affects commerce does not violate the Commerce Clause if it is designed to serve a legitimate state interest and if it is applied in a nondiscriminatory manner. Id. The court in such

instances must make a "delicate adjustment of the conflicting state and federal claims." Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366, 371, 96 S.Ct. 923, 928, 47 L.Ed.2d 55 (1976), quoting from H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 553, 69 S.Ct. 657, 679, 93 L.Ed. 865 (Black, J., dissenting). The traditional criteria for this "delicate adjustment" are set forth in Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174.

The Pike test centers on three key issues: (1) As a threshold issue, does the state law regulate evenhandedly; (2) Does the state law effectuate a legitimate local public purpose; and (3) Does it have only an incidental effect on interstate commerce. Assuming these questions are answered in the affirmative, "the Initiative will be upheld unless the burden

imposed on such commerce is clearly excessive in relation to the putative local benefits. . . ." Id. This balancing effort involves "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." Raymond Motor Transportation, Inc. v. Rice, supra, 434 U.S. at 441, 98 S.Ct. at 794.

The threshold issue must be answered in the negative. Where, as here, a state "overtly blocks the flow of interstate commerce at [the] State's borders," Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978), the state statute on its face discriminates against interstate commerce on the basis of origin. Such facial discrimination, regardless of the State's purpose, may by itself provide a sufficient basis to invalidate the statute. Id. Moreover, in

light of the Initiative's implied exemptions and the recent decision in Kassel v. Consolidated Freightways Corporation of Delaware, ___ U.S. ___, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981), it is also clear that an application of the Initiative to the movement of radioactive waste in interstate commerce would discriminate against commerce. The exemptions in the Initiative, particularly the implied exemption of all radioactive waste generated in Washington, offers the benefits of available radioactive waste storage to Washington's nuclear industry and effectively denies such benefits to the bulk of this country's nuclear industry. Moreover, since the Initiative impliedly exempts the shipment of radioactive waste through the State and, by its terms, is directed at the origin of the waste, it would appear that the State has decided that the principal harm from radioactive waste arises after

its disposal in a storage site. Thus, there is no basis to distinguish waste generated in Washington from waste generated in other states. In short, the Initiative on its face and in its plain effect is unconstitutional because it does not regulate evenhandedly. See Kassel v. Consolidated Freightways, supra; Philadelphia v. New Jersey, supra.

Even if such facial and substantive discrimination is not a per se fatal defect, "such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." Hughes v. Oklahoma, 441 U.S. 322, 337, 99 S.Ct. 1727, 1737, 60 L.Ed.2d 250 (1979). The Initiative cannot withstand such scrutiny.

While it has been held that "if safety justifications are not illusory, the Court will not second-guess legislative judgment," Raymond Motor Transportation, Inc.

v. Rice, supra 434 U.S. at 449, 98 S.Ct. at 798 (Blackmun, J., concurring), the mere incantation of "a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." Kassel v. Consolidated Freightways, ___ U.S. ___, ___, 101 S.Ct. 1309, 1316, 67 L.Ed.2d 580 (1981). This should be particularly true where, as here, the state law is a product of the Initiative process and not a product of the more detailed and deliberate approach normally associated with the state legislature.

Moreover, when discrimination against commerce is demonstrated, the State has the burden of demonstrating the local benefits flowing from the state statute and the unavailability of adequate nondiscriminatory alternatives. Hunt v. Washington Apple Advertising Comm'n., 432 U.S. 333, 353, 97 S.Ct. 2434, 2446, 53 L.Ed.2d 383 (1977). Here the defendants have failed to

present evidence that non-medical radioactive waste, transported and stored in compliance with Federal regulations, is dangerous to the health and safety of the citizens of the State of Washington. Indeed, a recent study by the Department of Social and Health Services of the State of Washington suggests that nuclear waste, if properly regulated, can be safely transported and also suggests that there are less discriminatory means to protect the public. See Stipulation of Authenticity of Documents, Exhibit 10. The closing sentence of the report's Abstract is particularly instructive:

> None of our studies detected serious personnel exposure problems, but further reductions can be obtained through the institution of better storage procedures, quicker handling techniques and maintaining greater distances from radiation sources.

Finally, the Initiative will clearly have more than an incidental effect on interstate commerce. As noted earlier,

Congress and the Department of Energy have noted the rapid growth of radioactive waste and the reduction in storage capacity. The Initiative will aggravate this national problem by substantially reducing all low-level radioactive waste storage and by precluding any commercial storage of absorbed low-level radioactive liquids.

Even if I were to consider the weight and nature of the state regulatory concern in light of the extent of the burden on interstate commerce, I would still hold that the Initiative violates the Commerce Clause. Since the State's safety interest, assuming proper compliance with adequate regulations, is at least arguably illusory and since the Initiative significantly impairs the federal interest in encouraging the peaceful use of radioactive material and in solving the radioactive waste problem, the Initiative cannot be harmonized with the Commerce Clause.

CONCLUSION

For the aforementioned reasons, I hold that the Initiative is unconstitutional and thus unenforceable. Therefore, plaintiffs' Motions for Summary Judgment are GRANTED. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

Office - Supreme Court, U.S.
FILED
DEC 7 1982
ALEXANDER L. STEVAS,
CLERK

82-841

NO. 84-841

IN THE

SUPREME COURT OF THE UNITED STATES

DON'T WASTE WASHINGTON LEGAL
DEFENSE FOUNDATION,
Petitioner,

v.

STATE OF WASHINGTON, et al.,
Defendants,.

WASHINGTON STATE BUILDING AND CONSTRUCTION
TRADES COUNCIL, AFL-CIO, et al.,
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION
FOR WRIT OF CERTIORARI

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APPENDIX

The Constitution of the United States reads in pertinent part:

Article I, Section 8:

> The Congress shall have Power ***
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes:

Article VI.

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Low-Level Radioactive Waste
Policy Act
Title 42 U.S.C.

Sec. 2, As used in this Act--

(2) The term "low-level radioactive waste" means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in section 11e.(2) of the Atomic Energy Act of 1954.

LOW-LEVEL RADIOACTIVE WASTE DISPOSAL

Sec. 4. (a)(1) It is the policy of the Federal Government that--

(A) each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders except for waste generated as a result of defense activities of the Secretary

or Federal research and development activities; and

(B) low-level radioactive waste can be most safely and efficiently managed on a regional basis.

(2)(A) To carry out the policy set forth in paragraph (1), the States may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste.

(B) A compact entered into under subparagraph (A) shall not take effect until the Congress has by law consented to the compact. Each such compact shall provide that every 5 years after the compact has taken effect the Congress may by law withdraw its consent. After January 1, 1986, any such compact may restrict the use of the regional disposal facilities under the compact to the disposal of

low-level radioactive waste generated within the region.

(b)(1) In order to assist the States in carrying out the policy set forth in subsection (a)(1), the Secretary shall prepare and submit to Congress and to each of the States within 120 days after the date of the enactment of this Act a report which--

(A) defines the disposal capacity needed for present and future low-level radioactive waste on a regional basis;

(B) defines the status of all commercial low-level radioactive waste disposal sites and includes an evaluation of the license status of each such site, the state of operation of each site, including operating history, an analysis of the adequacy of disposal technology employed at each site to contain

low-level radioactive wastes for their hazardous lifetimes, and such recommendations as the Secretary considers appropriate to assure protection of the public health and safety from wastes transported to such sites;

(C) evaluates the transportation requirements on a regional basis and in comparison with performance of present transportation practices for the shipment of low-level radioactive wastes, including an inventory of types and quantities of low-level wastes, and evaluation of shipment requirements for each type of waste and an evaluation of the ability of generators, shippers, and carriers to meet such requirements; and

(D) evaluates the capability of the low-level radioactive waste

disposal facilities owned and operated by the Department of Energy to provide interim storage for commercially generated low-level waste and estimates the costs associated with such interim storage.

(2) In carrying out this subsection, the secretary shall consult with the Governors of the States, the Nuclear Regulatory Commission, the Environmental Protection Agency, the United States Geological Survey, and the Secretary of Transportation, and such other agencies and departments as he finds appropriate.

COMPLETE TEXT OF
Initiative Measure 383

AN ACT Relating to radioactive waste; prohibiting the storage of certain radioactive waste in Washington state; creating a new chapter in Title 70 RCW; and providing penalties.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. The people of the state of Washington find that:

(1) Radioactive wastes are highly dangerous, in that releases of radioactive materials and emissions to the environment are inimical to the health and welfare of the people of the state of Washington, and contribute to the occurrences of harmful diseases, including excessive cancer and leukemia. The dangers posed by the transportation and presence of radioactive wastes are increased further by the long time periods that the wastes remain radioactive and highly dangerous;

(2) Transporting, handling, storing, or otherwise caring for radioactive waste presents a hazard to the health, safety, and welfare of the individual citizens of the state of Washington because of the ever-present risk that an accident or incident will occur while the wastes are being cared for;

(3) The likelihood that an accident will occur in this state involving the release of radioactive wastes to the environment becomes greater as the volume of wastes transported, handled, stored, or otherwise cared for in this state increases;

(4) The effects of unplanned releases of radioactive wastes into the environment, especially into the air and water of the state, are potentially both widespread and harmful to the health, safety, and welfare of the citizens of this state.

The burden and hazards posed by increasing the volume of radioactive wastes transported, handled, stored, or otherwise cared for in this state by the importation of such wastes from outside this state is not a hazard the state government may reasonably ask its citizens to bear. The people of the state of Washington believe that the principles of federalism do not require the sacrifice of the health, safety, and welfare of the people of one state for the convenience of other states or nations.

NEW SECTION. Sec. 2. The definitions set forth in this section apply throughout this chapter.

(1) "Radioactive waste" means unwanted radioactive material, including radioactive residues produced as a result of electric power generation or other reactor operation.

(2) "Medical waste" means radioactive waste from all therapy, diagnosis, or research in medical fields and radioactive waste which results from the production and manufacture of radioactive material used for therapy, diagnosis, or research in medical fields, except that "medical waste" does not include spent fuel or waste from the fuel of an isotope production reactor.

(3) "Radioactive waste generated or otherwise produced outside the geographic boundaries of the state of Washington" means radioactive waste which was located outside the state of Washington at the time of removal from a reactor vessel.

NEW SECTION. Sec. 3. Notwithstanding any law, order, or regulation to the contrary, after July 1, 1981, no area within the geographic boundaries of the state of Washington may be used by any person or entity as a temporary, interim, or permanent storage site for radioactive

waste, except medical waste, generated or otherwise produced outside the geographic boundaries of the state of Washington. This section does not apply to radioactive waste stored within the state of Washington prior to July 1, 1981.

NEW SECTION. Sec. 4. Notwithstanding any law, order, or regulation to the contrary, after July 1, 1981, no person or entity may transport radioactive waste, except medical waste, generated or otherwise produced outside the geographic boundaries of the state of Washington to any site within the geographic boundaries of the state of Washington for temporary, interim, or permanent storage.

NEW SECTION. Sec. 5. (1) A violation of or failure to comply with the provisions of section 3 or 4 of this act is a gross misdemeanor.

(2) Any person or entity that violates or fails to comply with the provisions of

sections 3 or 4 of this act is subject to a civil penalty of one thousand dollars for each violation or failure to comply.

(3) Each day upon which a violation occurs constitutes a separate violation for the purposes of subsections (1) and (2) of this section.

(4) Any person or entity violating this chapter may be enjoined from continuing the violation. The attorney general or any person residing in the state of Washington may bring an action to enjoin violations of this chapter, on his or her own behalf and on the behalf of all persons similarly situated. Such action may be maintained in the person's own name or in the name of the state of Washington. No bond may be required as a condition to obtaining any injunctive relief. The superior courts have jurisdiction over actions brought under this section, and venue shall lie in the county of the

plaintiff's residence, in the county in which the violation is alleged to occur, or in Thurston county. In addition to other relief, the court in its discretion may award attorney's and expert witness fees and costs of the suit to a party who demonstrates that a violation of this chapter has occurred.

NEW SECTION. Sec. 6. Notwithstanding the other provisions of this chapter, the state of Washington may enter into an interstate compact, which will become effective upon ratification by a majority of both houses of the United States Congress, to provide for the regional storage of radioactive wastes.

NEW SECTION. Sec. 7. This chapter shall be liberally construed to protect the health, safety, and welfare of the individual citizens of the state of Washington.

NEW SECTION. Sec. 8. If any provision of this act or its application

to any person or circumstances is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 9. This act may be known as the Radioactive Waste Storage and Transportation Act of 1980.

NEW SECTION. Sec. 10. Sections 1 through 9 of this act shall constitute a new chapter in Title 70 RCW.

WASHINGTON STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., Plaintiffs-Appellees,

v.

The Honorable John C. SPELLMAN, Governor of the State of Washington, et al., Defendants-Appellants.

UNITED STATES of America, Plaintiff-Appellee,

v.

STATE OF WASHINGTON, et al., Defendants-Appellants.

WASHINGTON STATE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., Plaintiffs-Appellees,

v.

The Honorable John C. SPELLMAN, et al., Defendants,

and

Don't Waste Washington Legal Defense Foundation, Intervenor-Defendant-Appellant.

UNITED STATES of America, Plaintiff-Appellee,

v.

STATE OF WASHINGTON, et al., Defendant,

and

Don't Waste Washington Legal Defense Foundation,
Intervenor-Defendant-Appellant.

Nos. 81-3453, 81-3454, 81-3460 and 81-3461.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 5, 1982.
Decided Aug. 17, 1982.

Suit challenging constitutionality of Washington statute prohibiting transportation and storage within state of radioactive waste produced outside state was brought. The United States District Court for the Eastern District of Washington, Robert J. McNichols, Chief Judge, 518 F.Supp. 928, found the statute unconstitutional, and appeal was taken. The Court of Appeals, Goodwin, Circuit Judge, held that the statute violated both the supremacy and the commerce clauses.

Affirmed.

1. Federal Civil Procedure 331

In action challenging constitutionality of Washington statute prohibiting importation of low-level radioactive waste originating outside state, public interest group that sponsored statute as initiative measure was entitled to intervene as matter of right. Fed. Rules Civ. Proc. Rule 24(a), 28 U.S.C.A.

2. States 4.10, 6

Washington statute closing borders of state to entry of low-level radioactive waste orginating outside state violated supremacy clause since it sought to regulate legitimate federal activity of disposing of such waste and since statute was not authorized by federal law permitting establishment and operation of regional disposal facilities through interstate compacts because it was not framed in terms of compact and because compact had not been

approved by Congress. U.S.C.A. Const. Art. 6, cl. 2; Atomic Energy Act of 1954, § 274, 42 U.S.C.A. § 2021; Low-Level Radioactive Waste Policy Act, § 2 et seq., 42 U.S.C.A. § 2021b et seq.

3. Commerce 52.10, 61(1)

Washington statute prohibiting transportation and storage within state of radioactive waste produced outside state was unconstitutional as violation of commerce clause since Congress had established pervasive statutory scheme to regulate nuclear activity. U.S.C.A. Const. Art. 1, § 8, cl. 3; Atomic Energy Act of 1954, § 274, 42 U.S.C.A. § 2021; Low-Level Radioactive Waste Policy Act, § 2 et seq., 42 U.S.C.A. § 2021b et seq.

4. Commerce 12

Even in absence of pervasive federal legislation, commerce clause prevents states from erecting barriers to free flow

of interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

5. Commerce 12

State statute may affect commerce without violating commerce clause if statute serves legitimate state interest and if it is applied in nondiscriminatory manner. U.S.C.A. Const. Art. 1, § 8, cl. 3.

6. Commerce 13.4, 54

Criteria for determining whether commerce clause has been violated is whether state law regulates evenhandedly, accomplishes legitimate local public purpose, and has only incidental effect on interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

Michael B. Crutcher, Seattle, Wash., argued for Washington State Bldg. et al., W. Russell Daggatt, Catherine B. Roach,

Roberta R. Katz, Preston, Thorgrimson, Ellis & Holman, Seattle, Wash., on brief.

Michael Hanbey, Asst. Atty. Gen., Olympia, Wash., argued for Spellman, et al.; Kenneth O. Eikenberry, Atty. Gen., Kenneth M. MacIntosh, Asst. Atty. Gen., Olympia, Wash., on brief.

Michael W. Gendler, Seattle, Wash. for amicus curiae.

Appeal from the United States District Court for the Eastern District of Washington.

Before GOODWIN and POOLE, Circuit Judges, and EAST*, District Judge.

GOODWIN, Circuit Judge

The district court granted summary judgment in favor of the United States and certain commercial users of a low-level

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

radioactive waste disposal site in the State of Washington. The decision, reported at 518 F.Supp. 928 (E.D. Wash. 1981), struck down as unconstitutional a Washington statute closing the borders of Washington to the entry of low-level radioactive waste originating outside the state. Don't Waste Washington (DWW), a public interest group which had sponsored the challenged initiative legislation, appeals the denial of leave to intervene as a party. The State appeals the summary judgment.

For more than fifteen years, the State of Washington has leased from the United States 1,000 acres in an area known as the Hanford Reservation. During this time, the State has sub-leased part of the land for use as a commercial low-level radioactive waste dump. By arrangement with the United States under § 274 of the Atomic Energy Act (42 U.S.C. § 2021), Washington monitors the

dumping site (Richland) and inspects shipments of waste to determine their compliance with state and federal regulations concerning radioactive material. The State also licenses users and collects a fee from them.

Richland is one of three low-level radioactive dump sites in operation nationwide and receives about 40 percent of the country's low-level radioactive waste. It is also the only currently operating site accepting absorbed-liquid low-level radioactive waste. Approximately 95 percent of the waste received bv Richland originates outside the State of Washington.

In November 1980, the voters of the State of Washington enacted Initiative Measure No. 383 ("383") prohibiting the transportation and storage within Washington of radioactive waste produced outside the state. The initiative also gave permission for the state to enter into an

interstate compact to solve the problem of radioactive waste on a regional basis. Federal legislation had already provided for military and high level radioactive wastes.

After the Washington initiative was approved by the voters, Congress passed the Low-Level Radioactive Waste Policy Act of 1981 (Pub.L. No. 96-573, 94 Stat. 3347, hereinafter referred to as the "Low-Level Waste Act") encouraging the use of compacts between and among states to accomplish regional storage of low-level radioactive waste. At the time the Low-Level Waste Act was passed, Congress was aware of the enactment of 383 in Washington.

The operator of the site, together with seven other plaintiffs, filed an action in district court seeking a declaration that 383 was unconstitutional and requesting injunctive relief. Shortly

afterward, the United States of America filed a similar action.

The parties concede that regulation of the disposal of high-level radioactive waste has been preempted by the federal government and that this area is therefore not susceptible to regulation by the states. The dispute concerns the power of a state to regulate within its borders the importation and disposal of low-level radioactive waste such as filter sludges, resins, filter bottoms, used gloves and protective clothing, rags, tools, papers, plastic and material used in the manufacture of smoke detectors, luminous dials and emergency exit signs.

The government and the users of the Richland site attack the state statute on two grounds: (1) the Atomic Energy Act and the Low-Level Waste Act preempt state action; and (2) Measure 383 violates the Commerce Clause of the United States

Constitution. The State of Washington contends that § 274 of the Atomic Energy Act and the interstate compact provision of the Low-Level Waste Act cede control to the state over low-level waste disposal in general. The State also argues that 383 does not violate the Commerce Clause.

[1] DWW appeals the district court's denial of its motion to intervene either as a matter of right under Federal Rules of Civil Procedure 24(a), or under Rule 24(b)'s provision for permissive intervention.

Denial of DWW's motion to intervene was error and accordingly we reverse as to that holding. Rule 24 traditionally has received a liberal construction in favor of applicants for intervention. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1904 (1972). DWW, as the public interest group that sponsored the initiative,

was entitled to intervention as a matter of right under Rule 24(a). However, while we sustain DWW's appeal, this reversal does not require a new trial because the holding of the case would not be changed. DWW was permitted to participate in the argument on the appeal from the order granting summary judgment, and its contentions were duly considered. We conclude that the district court was correct in granting summary judgment to the plaintiffs. No genuine issue of fact exists. Initiative 383 violates the Supremacy Clause and the Commerce Clause of the United States Constitution.

1. Supremacy Clause

[2] The initiative violates the Supremacy Clause because it seeks to regulate legitimate federal activity and to avoid the preemption of the Atomic Energy Act. Neither § 274 of the Act nor the

Low-Level Waste Act is a grant of total authority to the states over the disposal of low-level wastes within their own borders.

The regulation of the disposal of low-level radioactive waste is a legitimate federal activity, and Congress has not waived or delegated its authority over the subject. The United States' § 274 agreement with the State of Washington gives the State authority over such matters as licensing, inspection, and levying of lease and maintenance fees. However, as the district court correctly points out, complete control of the Richland site did not pass with the assignment of regulatory responsibilities.

The Low-Level Waste Act comes closer to yielding control of disposal sites to the states in which the sites are located. The Act permits the establishment and operation of regional disposal facilities

through interstate compacts. Because Congress specifically gives permission for regional disposal in this Act, states signatory to a compact could exclude waste from nonsignatory states without violating the Supremacy or Commerce Clauses. Permission to exclude such wastes, however, is conditioned on participation in a compact.

The State of Washington has signed the proposed Northwest Interstate Compact on Low-Level Radioactive Waste Management (Northwest Compact) with Oregon, Idaho, Montana and Utah. As of this date, the proposed compact has not received Congressional approval. Until the state participates in a compact which has become law, the Low-Level Waste Act does not grant power to any state to close its borders to interstate traffic in low-level waste.

In any case, Initiative 383 was not framed in terms of the Northwest Compact. It was an unqualified closing of the

Richland facility to all out-of-state users. As such, it violates the Supremacy Clause.

II. Commerce Clause

[3] Initiative 383 also violates the Commerce Clause. The initiative is based upon an impermissible exercise of the State of Washington's police powers. Congress has established in the Atomic Energy Act a pervasive statutory scheme to regulate nuclear activity. As discussed above, through § 274 of the Act and through the Low-Level Waste Act, Congress has also ceded some regulatory authority to the states. But Congress stopped short of granting the states power to ban wastes transported from outside their borders.

[4,5] Even in the absence of pervasive federal legislation, "the Commerce Clause prevents the States from erecting barriers to the free flow of interstate commerce." Raymond Motor Transportation, Inc. v. Rice,

434 U.S. 429, 440, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978). A state statute may affect commerce without violating the Commerce Clause, however, if the statute serves a legitimate state interest and if it is applied in a nondiscriminatory manner. Id.

[6] The criteria for determining whether the Commerce Clause has been violated are articulated in Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). The Pike test asks whether the state law (1) regulates evenhandedly; (2) accomplishes a legitimate local public purpose; and (3) has only an incidental effect on interstate commerce.

Low-level waste from within Washington and that traveling through the state are exempted from the initiative. Only out-of-state waste bound for disposal with Washington is banned. Such uneven treatment of

in-state and out-of-state parties fails the first part of the Pike test.

This facial discrimination, in turn, "invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatoary alternatives." Hughes v. Oklahoma, 441 U.S. 322, 337, 99 S.Ct. 1727, 1737, 60 L.Ed.2d 250 (1979). The initiative cannot withstand this level of scrutiny.

A challenge to bona fide safety regulations must overcome a strong presumption of validity. Bibb v. Navajo Freight Lines, 359 U.S. 520, 524, 79 S.Ct. 962, 964, 3 L.Ed.2d 1003 (1959). However, the Supreme Court has recently held that "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670, 101 S.Ct. 1309, 1316, 67 L.Ed.2d 580 (1981).

The state relies upon the proposition that "releases of radioactive materials and emissions to the environment are inimical to the health and welfare of the people of Washington . . . ." Initiative 383, § 1. Undoubtedly, the release of radioactive materials and emissions is inimical to the safety of the people of any state. The State of Washington neglects to address, however, the manner in which local waste, transported and stored within Washington has superior safety and environmental virtues over waste produced elsewhere and similarly controlled by state regulatory measures. Initiative 383, therefore, also fails the second part of the Pike test.

Finally, Initiative 383 has more than an incidental effect on interstate commerce. Washington receives two-fifths of the country's low-level radioactive waste and has the only site currently available to receive absorbed-liquid low-level waste.

Closing Washington's borders would significantly aggravate the national problem of low-level waste disposal. Thus, 383 fails to meet the last part of the Pike test and violates the Commerce Clause.

Further, 383 fails to qualify under either the market participant or quarantine theory exceptions to the Commerce Clause. The State's contention that it is a "market participant," thereby placing the initiative beyond the reach of the Commerce Clause, is unconvincing. The State argues that 383 is a proprietary measure enacted to limit the state's participation in the waste disposal market. Whether or not the State is a proprietor of the Richland site, the initiative is cast in state regulatory rather than in proprietary terms. The measure is based on public safety rather than on economic considerations. The measure denies entry of waste at the state's borders rather than at the site the

State is operating as a market participant. The measure establishes civil and criminal penalties which only a state and not a mere proprietor can enforce.

The State's quarantine theory is equally unconvincing. Under the quarantine theory, a state may close its borders to protect citizens against health hazards such as epidemics.

In Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), however, the Supreme Court held that one state may not "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." Id. at 628, 98 S.Ct. at 2538. In that case, the out-of-state user of a New Jersey disposal site challenged a New Jersey statute prohibiting the importation of out-of-state waste. The New Jersey statute, like the Washington initiative, protected the health of the individual

state's citizens while ignoring the nationwide problem of waste disposal. The Supreme Court found the measure "blocks the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause of the Constitution." Id. at 629, 98 S.Ct. at 2538. Thus, Initiative 383 fails to come within either the market participant or the quarantine theory exceptions to the Commerce Clause.

Affirmed.

WASHINGTON STATE BUILDING & CONSTRUCTION TRADES COUNCIL AFL-CIO, a Washington Corporation and labor Organization; Washington Voice of Energy, a Nonprofit Washington Corporation; U.S. Ecology, Inc., a California Corporation; Tri-City Nuclear Industrial Council, a Nonprofit Washington Corporation; Tri-State Motor Transit Co., a Delaware Corporation; Precision Castparts Corporation, an Oregon Corporation; Northern States Power Company, a Minnesota Corporation; and Chem-Nuclear Systems, Inc., a Washington Corporation, Plaintiffs,

v.

The Honorable John C. SPELLMAN, Governor of the State of Washington; the Honorable Kenneth Eikenberry, Attorney General of the State of Washington; and Alan J. Gibbs, Secretary of the State of Washington, Department of Social and Health Services, Defendants.

UNITED STATES of America, Plaintiff,

v.

STATE OF WASHINGTON, John C. Spellman, Governor of the State of Washington, and Kenneth O. Eikenberry, Attorney General of the State of Washington, Defendants.

Nos. C-81-154 RJM, C-81-190 RJM.

United States District Court
E. D. Washington.
June 26, 1981.

MEMORANDUM DECISION

ROBERT J. McNICHOLS, Chief Judge.

The plaintiffs in these cases challenge the constitutionality of Washington's Radioactive Waste Storage and Transportation Act Measure No. 383 (Initiative). Since the plaintiffs' motions for summary judgment rest on substantially similar grounds, their motions were joined for purposes of argument.

One of the plaintiffs, U.S. Ecology, Inc. operates one of the three active commercial nuclear waste disposal sites in the United States. It provides disposal services to the United States, various state governments and numerous commercial users throughout the country. The United States, in addition to being a substantial user of the commercial facility, also maintains its own disposal sites in Washington.

The defendant (State) by the Initiative, seeks to effectively ban the storage of all non-medical radioactive waste (waste) generated outside the State of Washington. The Initiative also bans the transportation of such waste to any storage site in Washington. The stated purpose of the Initiative was to protect the health and safety of the citizens of Washington. Although the State contends that the provision in the Initiative for an interstate compact might remove any impermissible ban on interstate commerce, the Initiative Compact Section does not provide a timely or effective exception to the ban.

The Initiative does not ban the transportation for storage or the storage of waste generated in Washington. Nor does it ban the transportation of radioactive material through Washington for use or

storage elsewhere. Consequently, the Initiative suggests that the perceived harms caused by the waste occur after its disposal in the storage sites.

The plaintiffs jointly contend that the Initiative violates the Commerce Clause, U.S.Const., Art. 1, § 8, cl. 3 and that under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, it has been pre-empted by federal law. (Atomic Energy Act, 42 U.S.C. §§ 2011 et seq.; Low-Level Radioactive Waste Policy Act, Pub.L.No. 96-573 (Dec. 23, 1980); Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801 et seq.). In addition, the United States contends that the Initiative violates the War Power and Property Clauses of the United States Constitution. With respect to the Commerce Clause, the State contends that the Initiative is valid as an action of a market participant or as a proper exercise of the State's police powers.

With respect to the Supremacy Clause, the State contends that the Initiative has not been preempted by federal law. I hold that the Initiative is unconstitutional and thus not enforceable.

FACTS

This controversy centers on the transportation to and storage of nuclear waste on the Hanford Reservation. This federal reservation consists of 562 square miles of land and facilities in and around Benton County, Washington. Since 1943, the reservation has been used for federal nuclear programs.

There are three storage areas on the reservation. The first two areas are owned and operated by the federal government. The first area provides storage for waste generated from federal energy programs and national defense activities. The second area contains a near-surface test facility

which is designed to test the feasibility of storing spent fuel and high-level waste in underground basalt formations. The third area arose out of a lease of approximately 1000 acres by the United States to the State of Washington. The State of Washington subleased approximately 100 of those acres to U.S. Ecology, Inc. for the operation of a low-level radioactive waste storage facility. Although there are two other active commercial facilities in the United States, the U.S. Ecology, Inc. site is the only existing commercial facility which can store absorbed low-level radioactive liquids.

The commercial site is licensed for its current activity by the State of Washington. The site is regulated under State and Federal regulations pertaining to atomic energy and health and environmental

protection. The United States Department of Transportation regulates the transportation of the radioactive waste.

The low-level radioactive waste problem is of national concern. S.Rep. No. 548, 96th Cong. (1980), reprinted in U.S.Code Cong. & Ad. News 11230. The latest Department of Energy statistics indicate commercial facilities generated over three million cubic feet of low-level waste in 1980. Low-Level Radioactive Waste Management Report (Draft Report, April 21, 1981). By 1985, the figure is expected to increase to over five and a half million cubic feet per year. Id.

The commercial storage facility on the Hanford Reservation is a key facility in the nation's waste disposal program. Specifically, it is the only commercial storage site which can store "absorbed low-level radioactive liquids." Moreover,

it accepted approximately twenty-seven percent (27%) of the total waste in 1980. While a site in Barnwell, South Carolina has been accepting more than fifty percent (50%) of the generated waste, a South Carolina "volume limitation program" will cut that site's capacity to less than twenty-five percent (25%) of the waste generated in 1985.

The facts of this case present a classic supply and demand problem. It is clear that there is a serious national problem with the increasing volume of waste, which must be stored somewhere, and a nearly simultaneous reduction of the already limited storage capacity. Congress has recognized this problem and taken steps to solve it to the end that a few states will not continue to bear the waste of many. If the Initiative were permitted to stand it would aggravate an already critical situation.

DISCUSSION

The Initiative is invalid for two reasons: it violates the Supremacy Clause and the Commerce Clause of the United States Constitution.

[1,2] The Initiative violates the Supremacy Clause because it seeks to regulate legitimate federal activity, and because it has been preempted by federal law.

If the Initiative seeks to regulate the transportation for storage and storage of all federal waste generated outside the State of Washington and the operations of the federal storage facility, the Initiative violates the Supremacy Clause. U.S. Const. Art. VI, cl. 2. Since defendants' counsel are unable to represent that the Initiative did not apply against the federal government, I must, in light of the Initiative's clear language, assume that it

does purport to apply to the federal government. Therefore, I am compelled to find that, to the extent that it is applicable to the United States government, the Initiative, in the absence of an express Congressional waiver of sovereignty, is unconstitutional. Hancock v. Train, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976); Mayo v. United States, 319 U.S. 441, 63 S.Ct. 1137, 87 L.Ed. 1504 (1943).

The doctrine of federal preemption has its roots in the Supremacy Clause. The issue is whether the federal government has preempted the state regulation of high-level and low-level radioactive wastes.

Since preemption may be demonstrated in either of two ways, my function is to determine: (1) Whether there is evidence (pervasive federal scheme or dominant federal interest) that Congress intended to supersede the police powers of the State,

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947) or (2) Whether the Initiative "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 58 L.Ed. 581 (1941).

By reviewing the pervasive federal statutory schemes for the regulation of radioactive waste, the Atomic Energy Act, the Low-Level Radioactive Waste Policy Act and the Hazardous Materials Transportation Act, and applying established judicial reasoning, I am convinced that Congress intended that the transportation and storage of all materials which pose radiation hazards would be regulated by the federal government except where jurisdiction was expressly ceded to the states. Northern States Power Company v. State of Minnesota, 447 F.2d 1143 (CA 8 1971),

aff'd, 405 U.S. 1035, 92 S.Ct. 1307, 31 L.Ed.2d 576 (1972) (nuclear waste releases); Consolidated Rail Corporation v. City of Dover, 450 F.Supp. 966 (D.Del. 1978) (hazardous freight and toxic materials.)

The State concedes, and the most recent legislative history confirms the fact that Congress has not expressly ceded management of high-level radioactive waste. S.Rep.No. 548, 96th Cong. (1980), reprinted in U.S. Code Cong. & Ad.News 11231. Since it is clear that federal law preempts any state ban on high-level waste, the only remaining issue is whether Congress has expressly ceded regulation of low-level wastes.

In this case, there are two federal expressions which might be interpreted as a grant of such authority: (1) the Agreement between the United States Atomic Energy Commission and the State

of Washington pursuant to Section 274 of the Atomic Energy Act (42 U.S.C. § 2021), and (2) the Low-Level Radioactive Waste Policy Act, Pub.L. No. 96-573 (Dec. 23, 1980).

Although the Section 274 Agreement expressly ceded qualified regulatory responsibility over byproduct materials, source materials and special nuclear materials, it did not cede control over all low-level wastes. Also, the Agreement, by its terms, contemplates "that State and Commission programs for protection against hazards of radiation will be coordinated and compatible." Agreement at p. 2. Moreoever, the Agreement recognizes the desirability of reciprocal recognition of licenses. Agreement at p. 5. Furthermore, Congress granted the authority to regulate certain nuclear material. It did not grant the authority to effectively ban the receipt and disposal of such material.

Finally, the Initiative was expressly based upon the State's police power to protect the health, safety and welfare of the citizens of Washington State. It was not premised on the Section 274 Agreement.

Thus, neither the Agreement nor the statute which authorized it represent an express grant of the authority to the State to effectively ban the storage or transport of low-level radioactive waste.

The Low-Level Waste Policy Act, (Low-Level Act), does constitute a valid but limited grant of authority to effectively ban the storage of certain waste. The Low-Level Act is important for several reasons. First, it clearly excludes federal waste or facilities from any action taken under a regional compact.

Second, the Low-Level Act recognizes the particularly acute national problem of a high demand for storage and a dwindling supply of storage capacity. At the same

time, the Act recognizes that those states (Nevada, South Carolina and Washington) which provide the nation's entire commercial disposal system cannot be expected to continue to bear the burden of the other states' waste problems.

Thirdly, the Low-Level Act presents a rational and equitable approach for resolving the waste disposal problem. Each state is now responsible "for providing for the availability of capacity either within or outside the State" for low-level radioactive waste disposal. Section 4(a)(1)(A). The Low-Level Act recognizes that a regional approach affords the safest and most efficient management. Section 4(a)(1)(B). Congress has authorized the states to join interstate compacts to provide for regional disposal sites. Section 4(a)(2)(A). These compacts are subject to approval by Congress. After January 1, 1986, any such regional compact may preclude disposal of

extra-regional waste in the compact's regional sites. Section 4(a)(2)(B).

The State's argument that Congress, by this statute, ceded complete authority to regulate is not persuasive because the statute merely makes each state "responsible for providing for the availability of capacity."

The State contends that the Federal Low-Level Waste Act does not preclude the State from presently banning the importation of waste. Such an interpretation of the statute is strained. Congress has authorized the State to enter into interstate compacts. After such compacts are approved by Congress, the regions established thereby may exclude waste from without the region after January 1, 1986 or at such other times as Congress may authorize.

A close reading of the statute and the legislative history reveals a Congressional

plan to place future responsibility on the individual states to dispose of their waste. To encourage individual state action, Congress made it clear to all states that if they did not make provision for their own waste by January 1, 1986, they could be denied access to other regions' disposal sites. At the same time, Congress recognized that the organization of regional compacts and construction of disposal sites would take time. Consequently, Congress expressly delayed any authorized ban on radioactive waste until January 1, 1986. If I were to adopt the contentions that Washington may ban waste today, the State of Washington would obstruct the efforts of Congress toward an orderly resolution of a significant national problem.

For the aforementioned reasons, the Initiative cannot withstand scrutiny under the Supremacy Clause.

COMMERCE CLAUSE

The plaintiffs contend that the Initiative violates the Commerce Clause, U.S.Const., Art. 1, § 8, cl. 3, because it discriminates against and interferes with interstate commerce. The State contends that the Initiative does not violate the Commerce Clause because: (1) the interstate movement of radioactive waste, unlike other substances, is not "commerce" within the meaning of the Commerce Clause; (2) the state is acting as a market participant; and (3) the Initiative is based upon a permissible exercise of the state's police powers.

[3] Both a common sense view of the facts and the principle that "[a]ll objects of interstate trade merit Commerce Clause protection; none [are] excluded by definition at the outset[,]" Philadelphia v. New Jersey, 437 U.S. 617, 622, 98

S.Ct. 2531, 2534, 57 L.Ed.2d 475 (1978), (solid or liquid waste), support a determination that the movement of radioactive waste in interstate commerce fits within the definition of "commerce" for constitutional purposes.

[4] The State's contention that the Initiative merely reflects the action of a "market participant" and that as such the Initiative is beyond the reach of the Commerce Clause is not persuasive. The Initiative is not a proprietary measure. The clear language of the Initiative establishes that it is a regulatory measure. It purports to effectively ban the transport for storage and the storage of certain material. It establishes civil and criminal penalties for violations. Moreover, the Initiative is based on a perceived need to protect the health and safety of the citizens of Washington. It is not based on economics or other factors

traditionally associated with proprietary measures. Finally, the State, as a lessor, is engaged in the rental business. The real proprietors are the United States government as an operator of two federal sites and U.S. Ecology, Inc., as the operator of the commercial site. Having determined that the movement of radioactive waste is "commerce" and that the State is not a "market participant", I must now determine whether the Initiative is permissible as an exercise of Washington's police power. I hold that the State of Washington, through the Initiative, has exceeded its police powers.

[5-8] Unlike the situation in South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 (1938), Congress has established a pervasive statutory scheme, in this case, to regulate nuclear activity. Although Congress has ceded some

of this authority to the states, it has not granted the states the power to effectively ban the transportation for storage or the storage of radioactive waste generated outside Washington. In the presence of such pervasive federal legislation, the Initiative must be invalidated. Campbell v. Hussey, 368 U.S. 297, 82 S.Ct. 327, 7 L.Ed.2d 299 (1961) (supplemental state tobacco regulation).

Even in the absence of federal legislation, "the Commerce Clause prevents the States from erecting barriers to the free flow of interstate commerce." Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 440, 98 S.Ct. 787, 793, 54 L.Ed.2d 664 (1978). However, a state statute which affects commerce does not violate the Commerce Clause if it is designed to serve a legitimate state interest and if it is applied in a nondiscriminatory manner. Id. The court in such

instances must make a "delicate adjustment of the conflicting state and federal claims." Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366, 371, 96 S.Ct. 923, 928, 47 L.Ed.2d 55 (1976), quoting from H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 553, 69 S.Ct. 657, 679, 93 L.Ed. 865 (Black, J., dissenting). The traditional criteria for this "delicate adjustment" are set forth in Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174.

The Pike test centers on three key issues: (1) As a threshold issue, does the state law regulate evenhandedly; (2) Does the state law effectuate a legitimate local public purpose; and (3) Does it have only an incidental effect on interstate commerce. Assuming these questions are answered in the affirmative, "the Initiative will be upheld unless the burden

imposed on such commerce is clearly excessive in relation to the putative local benefits. . . ." Id. This balancing effort involves "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." Raymond Motor Transportation, Inc. v. Rice, supra, 434 U.S. at 441, 98 S.Ct. at 794.

The threshold issue must be answered in the negative. Where, as here, a state "overtly blocks the flow of interstate commerce at [the] State's borders," Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978), the state statute on its face discriminates against interstate commerce on the basis of origin. Such facial discrimination, regardless of the State's purpose, may by itself provide a sufficient basis to invalidate the statute. Id. Moreover, in

light of the Initiative's implied exemptions and the recent decision in Kassel v. Consolidated Freightways Corporation of Delaware, ___ U.S. ___, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981), it is also clear that an application of the Initiative to the movement of radioactive waste in interstate commerce would discriminate against commerce. The exemptions in the Initiative, particularly the implied exemption of all radioactive waste generated in Washington, offers the benefits of available radioactive waste storage to Washington's nuclear industry and effectively denies such benefits to the bulk of this country's nuclear industry. Moreover, since the Initiative impliedly exempts the shipment of radioactive waste through the State and, by its terms, is directed at the origin of the waste, it would appear that the State has decided that the principal harm from radioactive waste arises after

its disposal in a storage site. Thus, there is no basis to distinguish waste generated in Washington from waste generated in other states. In short, the Initiative on its face and in its plain effect is unconstitutional because it does not regulate evenhandedly. See Kassel v. Consolidated Freightways, supra; Philadelphia v. New Jersey, supra.

Even if such facial and substantive discrimination is not a per se fatal defect, "such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." Hughes v. Oklahoma, 441 U.S. 322, 337, 99 S.Ct. 1727, 1737, 60 L.Ed.2d 250 (1979). The Initiative cannot withstand such scrutiny.

While it has been held that "if safety justifications are not illusory, the Court will not second-guess legislative judgment," Raymond Motor Transportation, Inc.

v. Rice, supra 434 U.S. at 449, 98 S.Ct. at 798 (Blackmun, J., concurring), the mere incantation of "a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." Kassel v. Consolidated Freightways, ___ U.S. ___, ___, 101 S.Ct. 1309, 1316, 67 L.Ed.2d 580 (1981). This should be particularly true where, as here, the state law is a product of the Initiative process and not a product of the more detailed and deliberate approach normally associated with the state legislature.

Moreover, when discrimination against commerce is demonstrated, the State has the burden of demonstrating the local benefits flowing from the state statute and the unavailability of adequate nondiscriminatory alternatives. Hunt v. Washington Apple Advertising Comm'n., 432 U.S. 333, 353, 97 S.Ct. 2434, 2446, 53 L.Ed.2d 383 (1977). Here the defendants have failed to

present evidence that non-medical radioactive waste, transported and stored in compliance with Federal regulations, is dangerous to the health and safety of the citizens of the State of Washington. Indeed, a recent study by the Department of Social and Health Services of the State of Washington suggests that nuclear waste, if properly regulated, can be safely transported and also suggests that there are less discriminatory means to protect the public. See Stipulation of Authenticity of Documents, Exhibit 10. The closing sentence of the report's Abstract is particularly instructive:

> None of our studies detected serious personnel exposure problems, but further reductions can be obtained through the institution of better storage procedures, quicker handling techniques and maintaining greater distances from radiation sources.

Finally, the Initiative will clearly have more than an incidental effect on interstate commerce. As noted earlier,

Congress and the Department of Energy have noted the rapid growth of radioactive waste and the reduction in storage capacity. The Initiative will aggravate this national problem by substantially reducing all low-level radioactive waste storage and by precluding any commercial storage of absorbed low-level radioactive liquids.

Even if I were to consider the weight and nature of the state regulatory concern in light of the extent of the burden on interstate commerce, I would still hold that the Initiative violates the Commerce Clause. Since the State's safety interest, assuming proper compliance with adequate regulations, is at least arguably illusory and since the Initiative significantly impairs the federal interest in encouraging the peaceful use of radioactive material and in solving the radioactive waste problem, the Initiative cannot be harmonized with the Commerce Clause.

CONCLUSION

For the aforementioned reasons, I hold that the Initiative is unconstitutional and thus unenforceable. Therefore, plaintiffs' Motions for Summary Judgment are GRANTED. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

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No. 82-841

IN THE

Supreme Court of the United States

October Term, 1982

DON'T WASTE WASHINGTON
LEGAL DEFENSE FOUNDATION,
Petitioner,
v.
STATE OF WASHINGTON, et al.,
Defendants,
v.
WASHINGTON STATE BUILDING AND
CONSTRUCTION TRADES COUNCIL, AFL-CIO,
et al.; and UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF OF RESPONDENTS WASHINGTON STATE BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state law banning the transportation into and subsequent storage within the state of only that radioactive waste generated outside the state's borders in violation of the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3?

2. Is such a state law preempted by the federal Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1976 & Supp. IV 1981), and the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-2021d (Supp. IV 1981), in violation of the Supremacy Clause of the United States Constitution, Art. VI, cl. 2?

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BRIEF OF RESPONDENTS WASHINGTON STATE BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al. IN OPPOSITION TO PETITION

CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the constitutional provisions and statutes cited by petitioner, set forth in the appendix are Section 274 of the Atomic Energy Act of 1954, 42 U.S.C. § 2021(b), and the entirety of the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-2021d.

STATEMENT OF THE CASE

This case involves the attempt, so far unsuccessful, of the state of Washington to close its borders to the importation and storage of radioactive waste generated outside its borders.[1]

In November 1980, the voters of the state of Washington adopted Initiative Measure 383, the Radioactive Waste Storage and Transportation Act of 1980, chapter 70.99 of the Revised Code of Washington ("Initiative 383"). Effective July 1, 1981, Initiative 383 would have banned the transportation into Washington and the subsequent storage there of non-medical radioactive waste generated outside the state of Washington, unless permitted by interstate compact.

Initiative 383 contains a series of legislative findings, the first of which is that radioactive waste is dangerous and that releases of radioactive materials and emissions into the environment are inimical to the health and welfare of the people of the state. Greater volumes of radioactive waste are said to increase the likelihood of an accident, with attendant harm to Washington's citizens. The findings state:

> The people of the state of Washington believe that the principles of federalism do not require the sacrifice of the health, safety, and welfare of the people of one state for the convenience of other states or nations.

Initiative 383, § 1.

Section 3 of Initiative 383 provides that after July 1, 1981,

> no area within the geographic boundaries of the state of Washington may be used by any person or entity as a temporary, interim, or permanent storage site for radioactive waste, except medical waste, generated or otherwise produced outside the geographic boundaries of the state of Washington.

Section 4 provides that after July 1, 1981,

> no person or entity may transport radioactive waste, except medical waste, generated or otherwise produced

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1. Initiative 383 does not ban the importation of "medical" radioactive waste generated outside the borders of Washington.

> outside the geographic boundaries of the state of Washington to any site within the geographic boundaries of the state of Washington for temporary, interim, or permanent storage.

Violation of Initiative 383 is a gross misdemeanor, punishable by a civil penalty of one thousand dollars per violation. *Id.* at § 5. Violations may be enjoined by action of the state Attorney General or by any person residing within the state. *Id.* Initiative 383 may be modified to the extent that the state of Washington enters into a regional compact for the storage of radioactive waste.[2] *Id.* at §6.

Initiative 383 contains no regulatory controls over radioactive waste generated within the state of Washington. The effect of Initiative 383 is to ban the importation into the state of Washington of low-level radioactive waste for purposes of storage in Washington, while allowing the continued transportation and disposal of such waste generated within the state.[3]

Low-level radioactive waste consists of garbage that has or may have been contaminated with radioactivity. It includes filter sludges, resins, filter bottoms, used gloves and protective clothing, rags, tools, papers, plastic and material used in the manufacture of smoke detectors, luminous dials and emergency exit signs. *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627, 629 (9th Cir. 1982). There are only three low-level radioactive waste disposal sites open to commercial users in the United States, and one of those, at Beatty, Nevada, is facing closure. Pet. at 5. The other two sites are located at Barnwell, South Carolina, and on the Hanford Reservation at Richland, Washington.

The Hanford site would be closed to out-of-state users if Initiative 383 were to become effective. Presently, Hanford

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2. A Northwest Interstate Compact on Low-Level Radioactive Waste Management, to which Washington is a party, has been submitted to Congress for ratification but has not yet been ratified.

3. Petitioners concede that regulation of high-level radioactive waste is reserved to the federal government. Pet. at i, n.1.

receives approximately forty percent of the nation's commercial low-level radioactive waste. Hanford is the only site accepting absorbed-liquid low-level waste. Approximately ninety-five percent of the waste received at Hanford originates outside the state of Washington. 684 F.2d at 629.

The Hanford site occupies 100 acres. The land is owned by the federal government and leased to the state of Washington, which, in turn, subleases it to US Ecology, the commercial operator of the site. *Id.* Pursuant to an agreement between the state of Washington and the Nuclear Regulatory Commission under Section 274 of the Atomic Energy Act, 42 U.S.C. § 2021, the state of Washington supervises the disposal site. State inspectors check incoming waste shipments to determine compliance with state and federal regulations concerning radioactive material. 684 F.2d at 629. The state charges fees to site users for the "perpetual surveillance and maintenance" of the deposited radioactive waste and recently enacted a thirty percent tax on the gross receipts of the site operator. Wash. Rev. Code § 43.21F.075(2), (1981); Wash. Rev. Code § 82.04.260(13) (Supp. 1982).

Low-level radioactive waste storage is a national problem. *Draft Low-Level Radioactive Waste Management Report*, U.S. Department of Energy, April 21, 1981, at 2 ("DOE Report"). Low-level radioactive waste is the inevitable byproduct of a variety of activities involving atomic energy. All fifty states and the District of Columbia generate low-level radioactive waste. In 1979, approximately fifty percent of the nation's low-level waste was generated by commercial power plants, nine percent by goverment or military facilities, twenty-two percent by industrial activities, and nineteen percent by medical and research institutions. DOE Report, at 3.

As the district court below observed, "The facts of this case present a classic supply and demand problem. It is clear that there is a serious national problem with the increasing volume of waste, which must be stored somewhere, and a nearly simultaneous reduction of the already limited storage capacity." *Washington State Building & Construction*

Trades Council v. Spellman, 518 F. Supp. 928, 931 (E.D. Wash. 1981).

In response to growing public concern over radioactive waste storage, including the adoption of Initiative 383, Congress enacted in 1980 the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-2021d (the "Low-Level Waste Act"). That act authorizes states to form interstate compacts for the purpose of establishing regional sites for low-level radioactive waste storage. Such compacts must be approved by Congress. After January 1, 1986, the compact states may exclude from their regional disposal sites waste originating outside the region.

After Initiative 383 was enacted, the private plaintiffs in this case (the "commercial users"), representing a broad spectrum of commercial interests using the Hanford site, brought an action to declare Initiative 383 to be unconstitutional and to enjoin its implementation.[4] Shortly thereafter, the United States brought a similar suit against the state of Washington. The cases were heard together in the district court and later consolidated by the court of appeals. Initiative 383 was defended by both the state of Washington and Don't Waste Washington, a public interest group that had sponsored the initiative.[5] The district court

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4. The commercial users have a direct interest in the continued operation of the Hanford low-level waste disposal site. Northern States Power Company and Precision Castparts generate low-level radioactive waste which is stored at Hanford. Chem-Nuclear provides packaging and solidification services for waste disposal. Tri-State Motor Transit hauls radioactive waste by motor vehicle in interstate commerce to Hanford. US Ecology is the site operator. Washington State Building and Construction Trades Council, AFL-CIO, represents union members in nuclear experimental activities related to the transportation and disposal of wastes at Hanford. Washington Voice of Energy and the Tri-City Nuclear Industrial Council are nonprofit citizens organizations promoting economic growth through the peaceful use of atomic energy. CR 20, pp. 2-5. (All references to the Clerk's record are to the record of *Washington State Building & Construction Trades Council v. Spellman* at the trial court level.)

5. Don't Waste Washington was denied intervention by the district court but was permitted to appear as amicus curiae and fully participated

granted summary judgment in favor of the commercial users and the United States. Both the state and Don't Waste Washington appealed. The Court of Appeals for the Ninth Circuit unanimously upheld the district court's conclusions that Initiative 383 violated the Commerce Clause and was preempted by federal law.

Don't Waste Washington now petitions for a writ of certiorari. The state of Washington has not sought review of the decision of the court of appeals. The commercial users submit this brief in opposition to the petition.

SUMMARY OF ARGUMENT

This Court should deny the petition because Initiative 383 is plainly unconstitutional, as both courts below found without strained analysis. This case is controlled by established precedent and presents no novel or unsettled issues of law that warrant Supreme Court review. There is no split of authority or conflict in the decisions of the courts of appeals to suggest that review of this case is appropriate. The state of Washington apparently thought so little of further legal defense of Initiative 383 that it declined to seek review of the decision of the court of appeals.

Washington's efforts to stop the flow of radioactive waste at its borders is a clear and dramatic interference with the free flow of interstate commerce. Initiative 383 bans the storage of out-of-state waste while permitting the continued storage of in-state waste. While health and safety justifications are urged in defense of Initiative 383, the petitioner fails to explain why radioactive waste generated within the state are safer than out-of-state waste, or why storage of in-state waste is to be preferred over the storage of wastes generated outside Washington's borders. Faced with a New Jersey ban on out-of-state waste destined for New

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Footnote 5 (con't)

in briefing and oral argument. The court of appeals reversed the district court's denial of intervention and accorded Don't Waste Washington intervenor status.

Jersey landfills, this Court struck down a very similar ban in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). While the nature of the waste involved here is different, and more exotic, Commerce Clause protections apply equally to "bads" as well as "goods." *Illinois v. General Electric Co.*, 683 F.2d 206, 213 (7th Cir. 1982), *petition for cert. filed sub nom. Fahner v. General Electric Co.*, No. 82-648, 51 U.S.L.W. 3320 (Oct. 12, 1982) (state law banning importation for storage of spent nuclear fuel held unconstitutional).

Petitioner asserts that this case presents an issue left unresolved in *City of Philadelphia*, namely, "whether the Commerce Clause precludes state prohibitions deemed essential to health and safety." Pet. at 9. This reference, however, is not to some new or unresolved area of law, but rather to the quarantine cases, where state authority to ban all commerce in noxious goods has been upheld. Such quarantine laws commonly require, for instance, the burial of diseased animal carcasses as promptly as possible. The critical difference between the quarantine laws and Initiative 383 is that the quarantine laws apply with equal force to in-state as well as out-of-state offal. Initiative 383 does not purport to require the burial of all radioactive waste as close as possible to the point of origin, but rather bans all out-of-state waste while permitting preferential treatment of in-state waste.

There is no conflict of law among the courts of appeals that would be resolved by hearing this case. *Illinois v. General Electric Co.*, the only similar case of which respondents are aware, involves Illinois' effort to ban the storage of spent nuclear fuel; the Seventh Circuit is in accord in that case with the Ninth Circuit in this case in holding such a law to be unconstitutional.

In arguing that Initiative 383 is not preempted by federal law, petitioner entirely neglects to mention the Atomic Energy Act of 1954, on which both the court of appeals and the district court relied in deciding the initiative to be preempted. 684 F.2d at 630; 518 F. Supp. at 931. The Atomic Energy Act is the keystone of the "pervasive federal statutory schemes for the regulation of radioactive waste." 518 F. Supp. at 931.

Instead, petitioner relies upon the Low-Level Waste Act for the proposition that Congress authorized the state of Washington to discriminate against out-of-state wastes. Pet. at 18. But the petitioner understandably fails to explain how the Low-Level Waste Act operates, because such an explanation would demonstrate that Initiative 383 is incompatible with the attainment of federal objectives set forth in the act. The Low-Level Waste Act authorizes the states to form regional compacts for the disposal of low-level radioactive waste. After congressional ratification of such a regional compact, and then only after January 1, 1986, waste generated outside the region may be exluded from the regional disposal sites. 42 U.S.C. § 2021d(a)(B). The Low-Level Waste Act encourages states to form regional compacts, for if they fail to do so, waste generated within their borders may be banned from existing disposal sites. By authorizing such exclusion only after January 1, 1986, however, the states are given a grace period in which to organize themselves for waste disposal.

Initiative 383 jumps the gun by imposing a single state 1981 ban. Both the court of appeals and the district court found that Initiative 383 was inconsistent with the federally proposed regional compact scheme. 684 F.2d at 630; 518 F. Supp. at 932-33. Both courts held Initiative 383 was preempted by federal law and violative of the Supremacy Clause.

Initiative 383 cannot stand if it violates either the Commerce Clause or the Supremacy Clause. There is nothing in the petition that merits a further review of this case, as a more detailed examination of the governing law will show.

ARGUMENT

I. The Ninth Circuit's Ruling That Initiative 383 Violates the Commerce Clause Is In Line With Established Supreme Court Precedent and a Recent Seventh Circuit Decision Addressing Identical Commerce Clause Issues.

Well-established Supreme Court precedent has guided the courts of appeals for both the Ninth and Seventh Circuits in striking down laws that forbid the transportation of radioactive waste into the state for storage or disposal but

allow the transportation and disposal of domestically generated waste.

In *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), the Seventh Circuit affirmed a grant of summary judgment below, declaring that Illinois' Spent Fuel Act violated the United States Constitution. With narrow exceptions, the challenged act forbade the importation of spent nuclear fuel for disposal or storage in Illinois. The Seventh Circuit ruled: "To pass laws that arbitrarily burden interstate commerce, by forbidding shipments merely because they originate out of state, violates the commerce clause, . . . and it is irrelevant that the traffic is in 'bads' rather than goods." 683 F.2d at 213 (citations omitted). The court rejected an argument that the law was a permissible quarantine measure and found that the case was governed by *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

In the instant case, the Court of Appeals for the Ninth Circuit likewise relied on *City of Philadelphia* in rejecting a quarantine argument and ruling that Initiative 383 violates the Commerce Clause. As respondents will demonstrate below, this decision was correct and should be allowed to stand without further review.

A. *Contrary to petitioner's assertions, this Court's decision in City of Philadelphia v. New Jersey is controlling.*

There is absolutely no merit to petitioner's argument that its petition "presents an important question of constitutional law reserved by this Court's decision in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978)." Pet. at 8. To the contrary, the Commerce Clause issues raised by Initiative 383 were squarely addressed by this Court in *City of Philadelphia*.

In that case, this Court invalidated a New Jersey law that prohibited that importation of most solid or liquid waste originating or collected outside the territorial limits of the state. The New Jersey law contained legislative findings, very similar to the findings in section 1 of Initiative 383, declaring that the growing volume of waste being deposited

in New Jersey threatened the public health, safety and welfare and required the exclusion from New Jersey of waste generated outside the state. This Court held that the New Jersey statute was an unconstitutional protectionist measure regardless of whether the purpose of the New Jersey statute was economic protectionism motivated by financial concerns, or protectionism motivated by concern for the health, safety and welfare of the citizenry at large. 437 U.S. at 626-27. Noting that "the evil of protectionism can reside in legislative means as well as legislative ends," 437 U.S. at 626, this Court ruled that the New Jersey statute violated the Commerce Clause principle of nondiscrimination by unjustifiably treating out-of-state waste more harshly than domestic waste. *Id.* at 626-27.

Similarly, Initiative 383 would permit the transportation and storage of all radioactive waste originating in Washington, while imposing a ban on the transportation and storage of radioactive waste from outside the state. Whatever validity might attach to the findings contained in Initiative 383, the legislative means adopted to effectuate the measure's alleged purpose will not pass muster under this Court's holding in *City of Philadelphia*.

At page eight of its petition, petitioner quotes a portion of this Court's opinion in *City of Philadelphia* in an attempt to show that the decision is not controlling on the uncontested facts here presented. Note, however, that petitioner omitted the sentence that immediately precedes the language excerpted. The quotation should read:

> *The New Jersey statute is not such a quarantine law.* There has been no claim here that the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible.

Id. at 629 (emphasis supplied to indicate sentence omitted by petitioner). The petitioner's argument that this Court's Commerce Clause analysis in *City of Philadelphia* reserved the question "whether the Commerce Clause precludes state prohibitions deemed essential to health and safety," Pet. at 9, is merely a Trojan horse concealing its twice-repeated and

twice-rejected argument that Initiative 383 is a constitutionally permissible quarantine measure.

In *City of Philadelphia*, the proponents of New Jersey's waste exclusion act argued that the measure was analogous to a quarantine and thus not a forbidden protectionist regulation. This Court disagreed, distinguishing the line of cases upholding quarantines from Commerce Clause attack:

> [T]hose quarantine laws banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commmerce as such, but simply prevented traffic in noxious articles, whatever their origins.

437 U.S. at 628-29. This Court noted that New Jersey's objections were directed to the harm caused by the waste after its disposal, at which point there is no basis for distinguishing out-of-state waste from domestic waste. New Jersey's attempt to ban one and permit disposal of the other was held to be clearly impermissible under the Commerce Clause.

Likewise, Initiative 383 suffers from a lack of evenhandedness, and the petitioner simply cannot sustain its thinly veiled argument that the measure is a constitutionally valid quarantine. As the district court pointed out, Initiative 383 exempts domestic waste and impliedly exempts the shipment of out-of-state waste through the state. 518 F. Supp. at 934. Thus, as in *City of Philadelphia*, the principal harm must be said to arise from waste after its disposal, and the state has conceded that there is no essential difference between domestically generated waste and waste generated outside Washington. CR 20, p. 8. Initiative 383 is no quarantine measure.

Furthermore, the analogy between diseased animal carcasses and low-level radioactive waste is a weak one. Laws banning the transportation of diseased animal carcasses are premised upon the assumption that any transportation involves unacceptable health and safety risks. A recent study by the Washington Department of Social and Health Services suggests, however, that radioactive waste, if

properly regulated, can be safely transported. 518 F. Supp. at 935. Washington State "failed to present evidence that non-medical radioactive waste, transported and stored in compliance with Federal regulations, is dangerous to the health and safety of the citizens of the State of Washington." *Id.*

B. *This Court need not even reach the issues raised in the petition because Initiative 383 directly interferes with interstate commerce and is per se invalid.*

In guarded language that glosses over Initiative 383's ban on the transportation and disposal of virtually all out-of-state radioactive waste, the petitioner presents the following Commerce Clause question for review: "Is a state law (Initiative 383) limiting import of low-level radioactive waste consistent with the Commerce Clause, when enacted solely for health and safety reasons and contrary to the state's economic interests?" Pet. at i. This Court need not even reach this issue in order to conclude that the court of appeals correctly decided that Initiative 383 violates the Commerce Clause. This case presents the kind of overt discrimination against interstate commerce that is facially invalid under *City of Philadelphia*. This determination can be made before weighing the state's health and safety rationale: "This dispute about the ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue to be decided . . .." 437 U.S. at 626.

In a long line of cases this Court has held fast to the proposition that the Commerce Clause prevents states from erecting barriers to the free flow of interstate commerce.[6] *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852). Although states remain free to regulate areas of commerce not governed by federal legislation, a state's actions may not offend the basic principle underlying the Commerce Clause

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6. Of course, Congress can authorize a state to act in derogation of the Commerce Clause, but Congress must expressly state its intent and policy to sustain state legislation from attack under the Commerce Clause. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 102 S. Ct. 1096 (1982). Nowhere has Congress expressly or even impliedly authorized Initiative 383.

that "the people of the several states must sink or swim together, and . . . in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

The Commerce Clause permits state regulation that only incidentally burdens interstate commerce, but a state statute that directly interferes with interstate commerce is invalid, regardless of the purpose for which it was enacted. *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2640 (1982); *Shafer v. Farmers' Grain Co.*, 268 U.S. 189, 199 (1925). Where a state statute patently discriminates against interstate commerce and overtly blocks the flow at its borders, there is a virtually *per se* rule of invalidity. *City of Philadelphia*, 437 U.S. at 624.

By its terms Initiative 383 interdicts the importation of all nonmedical low-level radioactive waste destined for disposal in the state and thus directly interferes with the flow of interstate commerce. By impeding the interstate movement of waste and preventing their efficient disposal, Initiative 383 interferes with the efficient allocation of resources. *Illinois v. General Electric Co.*, 683 F.2d at 213. Initiative 383 thus runs counter to the basic purpose of the Commerce Clause: to assure that our federal republic functions as a single economic unit. *City of Philadelphia*, 437 U.S. at 623. Initiative 383's direct restraint on interstate commerce is *per se* invalid.

C. *The court of appeals correctly decided that Initiative 383 is unconstitutional as measured by the test established by this Court in Pike v. Bruce Church, Inc.*

Even if this Court were to scrutinize Initiative 383 with the more forgiving eye reserved for state regulation that burdens interstate commerce only as an incident to safeguarding health and safety, the measure could not withstand a Commerce Clause challenge. A statute may operate evenhandedly to advance a legitimate local public interest and in so doing incidentally burden interstate commerce, so long as the burden on commerce is not clearly excessive in relation to the local benefits sought to be achieved. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The court of appeals correctly ruled that Initiative 383 cannot pass the test of validity set forth by this Court in *Pike*, that is, that a state law (1) regulate evenhandedly, (2) accomplish a legitimate local public purpose, and (3) only incidentally affect interstate commerce.

The distinction between permitted and prohibited waste under Initiative 383 is based solely on the state of origin. Such discriminatory treatment is wholly inconsistent with the standard of evenhandedness.

Initiative 383 fails as well to accomplish a legitimate local purpose. The measure purports to be a health and safety regulation premised on findings that the risk of accidental release of radioactive materials presents a health hazard. Initiative 383, §§ 1(1), (2), (4). While safeguarding citizens against the hazards of accidental release of radioactivity may well be a legitimate local purpose, Initiative 383 fails to *accomplish* this purpose because it would protect only against hazards posed by waste generated out of state. As the court of appeals noted, the state of Washington did not address "the manner in which local waste, transported and stored with Washington has superior safety and environmental virtues over waste produced elsewhere and similarly controlled by state regulatory measures." 684 F.2d at 631. As we argue below, the state's purposes could be more rationally served by the evenhanded regulation of waste transportation and storage than by a ban on interstate shipments for disposal in this state.

Petitioner's contention that an out-of-state waste ban is contrary to Washington's economic interests may have been made (it was never argued below) to underscore the purported health and safety justification of Initiative 383, but it is irrelevant. Pet. at 9. A state may not discriminate against interstate commerce for either economic or health and safety reasons. *City of Philadelphia*, 437 U.S. at 626-27.

Finally, as we have noted above, Initiative 383 has far more than an incidental burden on interstate commerce. All of the burden of protecting Washington's citizens is placed upon

interstate commerce, which accounts for ninety-five percent of the storage at the Hanford site. As the court of appeals noted,

> Washington receives two-fifths of the country's low-level radioactive waste and has the only site currently available to receive absorbed-liquid low-level waste. Closing Washington's borders would significantly aggravate the national problem of low-level waste disposal. Thus, 383 fails to meet the last part of the *Pike* test and violates the Commerce Clause.

684 F.2d at 631.

D. *The drafters of Initiative 383 have not chosen the least restrictive means available to accomplish their purposes.*

There is no merit to petitioner's argument that the state has adopted the least restrictive alternative available for pursuing its purported objective. Pet. at 15-16. The opposite is true. No limits are placed on the transportation or storage of waste generated within the state. Nor are any safeguards specified to make transportation or storage of all waste safer. No account is taken of geographical considerations that might make interstate shipment safer than intrastate shipment; in fact, in-state mileages for interstate shipments are shorter than mileages for most intrastate shipments. CR 20 at 8. No inspection system is established that might place an evenhanded burden on both interstate and intrastate commerce. Discrimination against interstate commerce is the exclusive and intended result of Initiative 383. In short, Initiative 383 adopts the *most* discriminatory alternative means possible for achieving its purported objective.

II. The Court of Appeals Correctly Ruled That Initiative 383 Is Preempted by Federal Law.

Initiative 383 is a direct obstacle to the accomplishment of congressional objectives with respect to the storage of low-level radioactive waste set forth in the Low-Level Waste Act. Initiative 383 also intrudes into an area of longstanding federal regulation resulting from the Atomic Energy Act of 1954.[7]

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7. Petitioner states, without citation of case authority, that implied preemption is disfavored. Pet. at 16. Yet this Court has stated many times

A. *Initiative 383 conflicts with the congressional objectives stated in the Low-Level Radioactive Waste Policy Act.*

The Low-Level Waste Act was enacted by Congress in 1980 to resolve the growing national problem of adequate storage for low-level radioactive waste. This legislative action was consistent with the federal government's historical and predominant role in the field of nuclear energy in general and protection against radiation hazards in particular.

Briefly, the Low-Level Waste Act authorizes the states to form interstate compacts, which are subject to continuing congressional approval. These compacts are to have authority to manage low-level waste disposal on a regional basis. After January 1, 1986, a compact may have the authority to exclude from its disposal site low-level waste from noncompact states.

Footnote 7 (con't)

that preemption under the Supremacy Clause of the Constitution, Art. VI, cl. 2, may be either express or implied. *See, e.g., Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 102 S. Ct. 3014, 3022 (1982). In the absence of explicit preemptive language, congressional intent to preempt state law may be evidenced in several ways. For example,

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be attained by the federal law and the character of obligations imposed by it may reveal the same purpose.

Rice v. Santa Fe Elevator Corp., 331 U.S. 213, 230 (1947). (Citations omitted).

Moreover, a judicial determination of preemption will result when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978), citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

While the Low-Level Waste Act identifies the role the individual states may play in the disposal process, that role is limited. The focus of the legislation is on the multistate compacts, not the individual states. Both the language and the legislative history of the Low-Level Waste Act show that Congress intended to maintain federal authority and control over the area of low-level waste disposal through continuing federal review of the compacts and continuing federal regulation of the waste storage sites. Initiative 383 not only intrudes into this area of federal authority, but it directly conflicts with Congress' regulatory scheme.

Petitioner asserts that the Low-Level Waste Act authorizes Washington to ban unilaterally the importation of radioactive waste generated outside the state. Yet there is no language in the Act that can be interpreted as giving a single state, acting on its own and not as part of a compact, the authority to ban waste from outside its borders. With respect to single states, the Low-Level Waste Act says only that "each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders," 42 U.S.C. § 2012d(a)(1)(A), and that "the State may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste." 42 U.S.C. § 2021d(a)(2)(A). The remainder of the Low-Level Waste Act refers to the actions of compact states rather than individual states.

Most significantly, the Low-Level Waste Act provides that only states acting as part of a congressionally approved compact may restrict the use of a waste disposal facility. 42 U.S.C. § 2021d(a)(2)(B). This point was stressed by both the court of appeals and the district court. 684 F.2d at 630; 518 F. Supp. at 932. Moreover, under the Low-Level Waste Act, any such restriction of a waste disposal facility may not occur until after January 1, 1986. 42 U.S.C. § 2021d(a)(2)(B). Initiative 383, by contrast, would permit Washington to ban the importation of waste as of July 1, 1981.

Petitioner suggests that the Low-Level Waste Act contains a plan for the interim storage of commercial radioactive

waste at federal disposal facilities and that such a plan demonstrate Congress' intent to permit a single state to ban presently the importation of waste. Pet. at 18. The Low-Level Waste Act, however, does not contain a plan for storage of commercial waste at federal facilities; rather, it authorizes the Secretary of the Department of Energy to prepare a report regarding several matters, including the status of existing commercial waste sites and the capability of federal disposal facilities to provide "interim storage." 42 U.S.C. § 2021d(b)(1). Nothing in the Low-Level Waste Act authorizes federal facilities to receive commercial waste on an interim basis. The reference to "interim storage" is an element in the scope of the DOE Report, nothing more, and provides scant justification for petitioner's claim that a single state can ban radioactive waste from other states.

Petitioner also quotes selective portions of the legislative history of the Low-Level Waste Act in an effort to show that Congress, by blessing Initiative 383, authorized Washington to unilaterally ban the importation of radioactive waste before any compacts were approved by Congress. Petitioner's selections of legislative history, however, are taken out of context and do not accurately reflect the meaning of the speakers' remarks when read in their entirety. For example, the statement of Senator Thurmond quoted by petitioner at page 18 was preceded and followed by the remarks that are italicized below:

> *Both Chambers have now passed bills encouraging the development of such agreements or compacts to allow for the management and disposal of low-level, radioactive waste on a regional basis. Both bills also provide that, once Congress has approved a regional compact, nuclear waste generated in States which are not a member of the compact may be excluded from burial within the compact boundaries. This exclusivity power is an essential feature of any workable regional compact plan for the safe disposal of low-level nuclear wastes.*
>
> I wish to leave the responsibility for handling this problem where it rightfully belongs—with the individual States. *At the same time, the seriousness of the problem on a national basis demands that the States be encouraged to promptly cooperate among themselves,*

> *a result that will not be forthcoming if the Congress fails to enact this legislation now.*

126 Cong. Rec. S 16544 (daily ed. Dec. 13, 1980) (emphasis added).

Petitioner similarly has ignored other portions of legislative history that reflect Congress' awareness that restrictions of waste storage sites could be contrary to the Commerce Clause and therefore should be permitted only by congressionally-approved compacts and only after January 1, 1986. For example, Representative Udall made the following remarks about the Low-Level Waste Act:

> These compacts must be approved by Congress, and cannot take effect before 1986. These protections assure that the compacts will not have a deleterious effect on interstate commerce, and that all States and regions will have adequate time to develop disposal facilities.

126 Cong. Rec. H 12495 (daily ed. Dec. 13, 1980).

In short, a fair reading of the legislative history shows that (1) regional compacts were to be devices for regulating low-level waste disposal, (2) exclusionary power could only be exercised through the compact arrangement, (3) before such exclusionary power could be exercised, congressional ratification of the compacts would be required, and (4) such exclusionary action, in any event, could not take place before 1986.

Even if the legislative history were considered to be ambiguous, the petitioner has not met the high burden of showing that Congress "expressly stated its intent and policy" to sustain state legislation that violates the Commerce Clause. *New England Power Company v. New Hampshire*, 102 S. Ct. at 1102-03. More is required than "mere speculation as to what Congress 'probably had in mind' " before discriminatory state legislation will be upheld. *Id.*

Initiative 383 authorizes the state of Washington to begin banning the importation of low-level radioactive waste on July 1, 1981. The Low-Level Waste Act, however, provides that only congressionally-approved compacts may have authority to restrict importation of waste and that such authority will not arise until January 1, 1986. The

congressional answer to the national problem of low-level waste storage is the regional compact, not unilateral state action that frustrates the orderly development of such compacts.[8] Initiative 383, with its authorization of such unilateral state action, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978), citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

As the court of appeals concluded,

> Initiative 383 was not framed in terms of the Northwest [Regional] Compact. It was an unqualified closing of the Richland facility to all out-of-state users. As such, it violates the Supremacy Clause.

684 F.2d at 630.

B. *Initiative 383 intrudes into a field of federal regulation deriving from the Atomic Energy Act of 1954.*

Petitioner completely ignores the decision of both courts below that the pervasive scheme of federal regulation that preempts Initiative 383 includes the Atomic Energy Act of 1954 ("Atomic Energy Act"). As the court of appeals stated, "the initiative violates the Supremacy Clause because it seeks to regulate legitimate federal activity and to avoid the preemption of the Atomic Energy Act." 684 F.2d at 630.

The Atomic Energy Act contains a long-standing and comprehensive scheme for federal control of the private use of nuclear energy. This scheme includes a requirement of federal licenses for possession, transfer or use of nuclear materials and for the construction and operation of facilities that produce or use these materials. 42 U.S.C. §§ 2073, 2092, 2111, 2131.

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8. Petitioner falsely accuses the respondents of "a desire to defer development of a national waste management policy solely at the risk of Washington residents," Pet. at 14, while ignoring that Congress has established a national policy for the management of low-level waste in the Low-Level Waste Act.

Section 274 of the Atomic Energy Act was added in 1959 to authorize the Nuclear Regulatory Commission (the "Commission") to enter into agreements with the Governors of states ("agreement states") which would assume some of the Commission's regulatory powers for the duration of the agreement. In particular, an agreement state may assume certain regulatory powers of the Commission under subchapters V, VI and VII of the Atomic Energy Act, which pertain primarily to licensing. 42 U.S.C. § 2021(b). Any state regulation enacted pursuant to a Section 274 agreement is required to be coordinated and compatible with Commission programs for protection against radiation hazards. 42 U.S.C. § 2021(g).

It is implicit in Section 274 of the Atomic Energy Act that Congress has plenary authority to regulate in the area of protection against radiation hazards. *Pacific Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903, 921 (9th Cir. 1981), *cert. granted sub nom. Pacific Gas & Electric Co. v. State Energy Resoures Conservation & Development Commission*, 102 S. Ct. 2956 (1982); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1149-50 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). Accordingly, a state's power to regulate in that area derives solely from and can never go beyond the particular terms of its Section 274 agreement. *See* S. Rep. No. 870, 86th Cong., 1st Sess. 9, *reprinted in* 1959 *U.S. Code Cong. & Ad. News* 2872.

Washington has been an agreement state since 1966. Washington's authority under its agreement with the Commission is confined primarily to licensing nuclear materials. In Article V of the agreement, Washington obligates itself to use its best efforts to assure that its program will at all times be compatible with the Commission's regulatory program. Article VII of the agreement states that the Commission may suspend or terminate the agreement if it determines that such action is necessary to protect public health and safety.

Initiative 383, in attempting to protect against radiation hazards by imposing an almost total ban on the

transportation and storage of radioactive waste generated outside the borders of the state, goes far beyond the scope of authority granted to Washington in its agreement with the Commission. The limited power to regulate nuclear materials does not encompass the power to ban such materials, and particularly to ban them discriminatorily on the basis of their state of origin. To regulate is to grant permission to operate under defined standards; it is not the power to prohibit an activity altogether. 36A *Words and Phrases* "Regulate," 315-21 (West 1962). As the court of appeals explained:

> The regulation of the disposal of low-level radioactive waste is a legitimate federal activity, and Congress has not waived or delegated its authority over the subject. The United States' § 274 agreement with the State of Washington gives the State authority over such matters as licensing, inspection, and levying of lease and maintenance fees. However, as the district court correctly points out, complete control of the Richland site did not pass with the assignment of regulatory responsibilities.

684 F.2d at 620.

Furthermore, Initiative 383's ban on the importation of radioactive waste directly conflicts with the state's promise in Article V of the Agreement to use its best efforts to maintain uniform regulatory schemes throughout the United States. Section 274's compatibility requirement reflects congressional recognition that centralized authority and uniform regulation are essential to preserve the dominant federal interest in encouraging the development of nuclear power while protecting the public against radiation hazards. 42 U.S.C. § 2013. Attainment of these dual goals requires coordination and cooperation among the states and between each state and the federal government. Initiative 383 conflicts with these goals by banning interstate shipments of radioactive waste from a geologically and demographically suitable disposal site in Washington.

As the courts below correctly concluded, because Initiative 383 exceeds the authority granted to the state of Washington

under Section 274 of the Atomic Energy Act, it intrudes into a field occupied by the federal government and violates the Supremacy Clause.

In summarizing the preemption issue, the court of appeals held that "[n]either § 274 of the Act nor the Low-Level Waste Act is a grant of total authority to the states over the disposal of low-level wastes within their own borders." 684 F.2d at 630.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Dated this 17th day of December, 1982.

Respectfully submitted,

PRESTON, THORGRIMSON,
ELLIS & HOLMAN

By: MICHAEL B. CRUTCHER
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APPENDIX A

Section 274 of the

ATOMIC ENERGY ACT OF 1954
42 U.S.C. § 2021

§ 2021. Cooperation with States

(a) Purpose

It is the purpose of this section—

(1) to recognize the interests of the States in the peaceful uses of atomic energy, and to clarify the respective responsibilities under this chapter of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials;

(2) to recognize the need, and establish programs for, cooperation between the States and the Commission with respect to control of radiation hazards associated with use of such materials;

(3) to promote an orderly regulatory pattern between the Commission and State governments with respect to nuclear development and use and regulation of byproduct, source, and special nuclear materials;

(4) to establish procedures and criteria for discontinuance of certain of the Commission's regulatory responsibilities with respect to byproduct, source, and special nuclear materials, and the assumption thereof by the States;

(5) to provide for coordination of the development of radiation standards for the guidance of Federal agencies and cooperation with the States; and

(6) to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable.

(b) Agreements with States

Except as provided in subsection (c) of this section, the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission under subchapters V, VI, and VII of this chapter, and section 2201 of this title,

with respect to any one or more of the following materials within the State—

(1) byproduct materials as defined in section 2014(e)(1) of this title;

(2) byproduct materials as defined in section 2014(e)(2) of this title;

(3) source materials;

(4) special nuclear materials in quantities not sufficient to form a critical mass.

During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.

(c) Commission regulation of certain activities

No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of—

(1) the construction and operation of any production or utilization facility;

(2) the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;

(3) the disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;

(4) the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

The Commission shall also retain authority under any such agreement to make a determination that all applicable standards and requirements have been met prior to termination of a license for byproduct material, as defined

in section 2014(e)(2) of this title. Notwithstanding any agreement between the Commission and any State pursuant to subsection (b) of this section, the Commission is authorized by rule, regulation, or order to require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of such product except pursuant to a license issued by the Commission.

(d) Conditions

The Commission shall enter into an agreement under subsection (b) of this section with any State if—

(1) The Governor of that State certifies that the State has a program for the control of radiation hazards adequate to protect the public health and safety with respect to the materials within the State covered by the proposed agreement, and that the State desires to assume regulatory responsibility for such materials; and

(2) the Commission finds that the State program is in accordance with the requirements of subsection (o) of this section and in all other respects compatible with the Commission's program for the regulation of such materials, and that the State program is adequate to protect the public health and safety with respect to the materials covered by the proposed agreement.

(e) Publication in Federal Register; comment of interested persons

(1) Before any agreement under subsection (b) of this section is signed by the Commission, the terms of the proposed agreement and of proposed exemptions pursuant to subsection (f) of this section shall be published once each week for four consecutive weeks in the Federal Register; and such opportunity for comment by interested persons on the proposed agreement and exemptions shall be allowed as the Commission determines by regulation or order to be appropriate.

(2) Each proposed agreement shall include the proposed effective date of such proposed agreement or exemptions.

The agreement and exemptions shall be published in the Federal Register within thirty days after signature by the Commission and the Governor.

(f) Exemptions

The Commission is authorized and directed, by regulation or order, to grant such exemptions from the licensing requirements contained in subchapters V, VI, and VII of this chapter, and from its regulations applicable to licensees as the Commission finds necessary or appropriate to carry out any agreement entered into pursuant to subsection (b) of this section.

(g) Compatible radiation standards

The Commission is authorized and directed to cooperate with the States in the formulation of standards for protection against hazards of radiation to assure that State and Commission programs for protection against hazards of radiation will be coordinated and compatible.

(h) Consultative, advisory and miscellaneous functions of the Administrator of the Environmental Protection Agency

The Administrator of the Environmental Protection Agency shall consult qualified scientists and experts in radiation matters, including the President of the National Academy of Sciences, the Chairman of the National Committee on Radiation Protection and Measurement, and qualified experts in the field of biology and medicine and in the field of health physics. The Special Assistant to the President for Science and Technology, or his designee, is authorized to attend meetings with, participate in the deliberations of, and to advise the Administrator. The Administrator shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with States. The Administrator shall also perform such other functions as the President may assign to him by Executive order.

(i) Inspections and other functions; training and other assistance

The Commission in carrying out its licensing and regulatory responsibilities under this chapter is authorized to enter into agreements with any State, or group of States, to perform inspections or other functions on a cooperative basis as the Commission deems appropriate. The Commission is also authorized to provide training, with or without charge, to employees of, and such other assistance to, any State or political subdivision thereof or group of States as the Commission deems appropriate. Any such provision or assistance by the Commission shall take into account the additional expenses that may be incurred by a State as a consequence of the State's entering into an agreement with the Commission pursuant to subsection (b) of this section.

(j) Reserve power to terminate or suspend agreement; emergency situations; State nonaction on causes of danger; authority exercisable only during emergency and commensurate with danger

(1) The Commission, upon its own initative after reasonable notice and opportunity for hearing to the State with which an agreement under subsection (b) of this section has become effective, or upon request of the Governor of such State, may terminate or suspend all or part of its agreement with the State and reassert the licensing and regulatory authority vested in it under this chapter, if the Commission finds that (1) such termination or suspension is required to protect the public health and safety, or (2) the State has not complied with one or more of the requirements of this section. The Commission shall periodically review such agreements and actions taken by the States under the agreements to ensure compliance with the provisions of this section.

(2)The Commission, upon its own motion or upon request of the Governor of any State, may, after notifying the Governor, temporarily suspend all or part of its agreement with the State without notice or hearing if, in the judgment of the Commission:

(A) an emergency situation exists with respect to any material covered by such an agreement creating danger which requires immediate action to protect the health or safety of persons either within or outside the State, and

(B) the state has failed to take steps necessary to contain or eliminate the cause of the danger within a reasonable time after the situation arose.

A temporary suspension under this paragraph shall remain in effect only for such time as the emergency situation exists and shall authorize the Commission to exercise its authority only to the extent necessary to contain or eliminate the danger.

(k) State regulation of activities for certain purposes

Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

(l) Commission regulated activites; notice of filing; hearing

With respect to each application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to subsection (c) of this section, the Commission shall give prompt notice to the State or States in which the activity will be conducted of the filing of the license application; and shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.

(m) Limitation of agreements and exemptions

No agreement entered into under subsection (b) of this section, and no exemption granted pursuant to subsection (f) of this section, shall affect the authority of the Commission under section 2201(b) or (i) of this title to issue rules, regulations, or orders to protect the common defense and security, to protect restricted data or to guard against the loss or diversion of special nuclear material. For purposes of section 2201(i) of this title, activities covered by

exemptions granted pursuant to subsection (f) of this section shall be deemed to constitute activities authorized pursuant to this chapter; and special nuclear material acquired by any person pursuant to such an exemption shall be deemed to have been acquired pursuant to section 2073 of this title.

(n) Definitions

As used in this section, the term State means any State, Territory, or possession of the United States, the Canal Zone, Puerto Rico, and the District of Columbia. As used in this section, the term "agreement" includes any amendment to any agreement.

(o) State compliance requirements: compliance with section 2113(b) of this title and health and environmental protection standards; procedures for licenses, rulemaking, and license impact analysis; amendment of agreements for transfer of State collected funds; proceedings duplication restriction

In the licensing and regulation of byproduct material, as defined in section 2014(e)(2) of this title, or of any activity which results in the production of byproduct material as so defined under an agreement entered into pursuant to subsection (b) of this section, a State shall require—

(1) compliance with the requirements of subsection (b) of section 2113 of this title (respecting ownership of byproduct material and land), and

(2) compliance with standards which shall be adopted by the State for the protection of the public health, safety, and the environment from hazards associated with such material which are equivalent, to the extent practicable, or more stringent than, standards adopted and enforced by the Commission for the same purpose, including requirements and standards promulgated by the Commission and the Administrator of the Environmental Protection Agency pursuant to sections 2113, 2114, and 2022 of this title, and

(3) procedures which—

(A) in the case of licenses, provide procedures under State law which include—

(i) an opportunity, after public notice, for written comments and a public hearing, with a transcript,

(ii) an opportunity for cross examination, and

(iii) a written determination which is based upon findings included in such determination and upon the evidence presented during the public comment period and which is subject to judicial review;

(B) in the case of rulemaking, provide an opportunity for public participation through written comments or a public hearing and provide for judicial review of the rule;

(C) require for each license which has a significant impact on the human environment a written analysis (which shall be available to the public before the commencement of any such proceedings) of the impact of such license, including any activities conducted pursuant thereto, on the environment, which analysis shall include—

(i) an assessment of the radiological and nonradiological impacts to the public health of the activities to be conducted pursuant to such license;

(ii) an assessment of any impact on any waterway and groundwater resulting from such activities;

(iii) consideration of alternatives, including alternative sites and engineering methods, to the activities to be conducted pursuant to such license; and

(iv) consideration of the long-term impacts, including decommissioning, decontamination, and reclamation impacts, associated with activities to be conducted pursuant to such license, including the management of any byproduct material, as defined by section 2014(e)(2) of this title; and

APPENDIX B

PUBLIC LAW 96-573 [S.2189]; December 23, 1980

LOW-LEVEL RADIOACTIVE WASTE POLICY ACT

An Act to set forth a Federal policy for the disposal of low-level radioactive wastes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This Act may be cited as the "Low-Level Radioactive Waste Policy Act".

DEFINITIONS

Sec. 2. As used in this Act—

1) The term "disposal" means the isolation of low-level radioactive waste pursuant to requirements established by the Nuclear Regulatory Commission under applicable laws.

2) The term "low-level radioactive waste" means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in section 11e.(2) of the Atomic Energy Act of 1954.

3) The term "State" means any State of the United States, the District of Columbia, and, subject to the provisions of Public Law 96-205, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

4) For purposes of this Act the term "atomic energy defense activities of the Secretary" includes those activities and facilities of the Department of Energy carrying out the function of—

(i) Naval reactors development and propulsion,

(ii) weapons activities, verification and control technology,

(iii) defense materials production,

(iv) inertial confinement fusion,

(v) defense waste management, and

(vi) defense nuclear materials security and safeguards (all as included in the Department of Energy appropriations account in any fiscal year for atomic energy defense activities).

GENERAL PROVISIONS

Sec. 3. (a) Compacts established under this Act or actions taken under such compacts shall not be applicable to the transportation, management, or disposal of low-level radioactive waste from atomic energy defense activities of the Secretary or Federal research and development activities.

(b) Any facility established or operated exclusively for the disposal of low-level radioactive waste produced by atomic energy defense activities of the Secretary or Federal research and development activities shall not be subject to compacts established under this Act or actions taken under such compacts.

LOW-LEVEL RADIOACTIVE WASTE DISPOSAL

Sec. 4. (a)(1) It is the policy of the Federal Government that—

(A) each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders except for waste generated as a result of defense activities of the Secretary or Federal research and development actitities; and

(B) low-level radioactive waste can be most safely and efficiently managed on a regional basis.

(2)(A) To carry out the policy set forth in paragraph (1), the States may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste.

(B) A compact entered into under subparagraph (A) shall not take effect until the Congress has by law consented to the compact. Each such compact shall provide that every 5 years after the compact has taken effect the Congress may by law withdraw its consent. After January 1, 1986, any such compact may restrict the use of the regional disposal facilities under the compact to the disposal of low-level radioactive waste generated within the region.

(b)(1) In order to assist the States in carrying out the policy set forth in subsection (a)(1), the Secretary shall prepare and submit to Congress and to each of the States within 120 days after the date of the enactment of this Act a report which—

(A) defines the disposal capacity needed for present and future low-level radioactive waste on a regional basis;

(B) defines the status of all commercial low-level radioactive waste disposal sites and includes an evaluation of the license status of each such site, the state of operation of each site, including operating history, an analysis of the adequacy of disposal technology employed at each site to contain low-level radioactive wastes for their hazardous lifetimes, and such recommendations as the Secretary considers appropriate to assure protection of the public health and safety from wastes transported to such site;

(C) evaluates the transportation requirements on a regional basis and in comparison with performance of present transportation practices for the shipment of low-level radioactive wastes, including an inventory of types and quantities of low-level wastes, and evaluation of shipment requirements for each type of waste and an evaluation of the ability of generators, shippers, and carriers to meet such requirements; and

(D) evaluates the capability of the low-level radioactive waste disposal facilities owned and operated by the Department of Energy to provide interim storage for commercially generated low-level waste and estimates the costs associated with such interim storage.

(2) In carrying out this subsection, the Secretary shall consult with the Governors of the States, the Nuclear Regulatory Commission, the Environmental Protection Agency, the United States Geological Survey, and the Secretary of Transportation, and such other agencies and departments as he finds appropriate.

Approved December 22, 1980.

LEGISLATIVE HISTORY:

SENATE REPORT No. 96-548 (Comm. on Energy and Natural Resources).

CONGRESSIONAL RECORD, Vol. 126 (1980):

July 28-30, considered and passed Senate.

Dec. 3, H.R. 8378 considered and passed House; passage vacated and S. 2189, amended, passed in lieu.

Dec. 13, Senate agreed to the House amendment with amendments; House agreed to Senate amendments.

Supreme Court, U.S.
FILED
JAN 25 1983
Alexander L. Stevas, Clerk

No. 82-841

In the Supreme Court of the United States

OCTOBER TERM, 1982

DON'T WASTE WASHINGTON LEGAL DEFENSE FOUNDATION, PETITIONER

v.

STATE OF WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of a decision that a state statute banning the transport for storage within the state, or the storage itself, of out-of-state, nonmedical radioactive wastes violates the Commerce Clause (Article I, Section 8, Clause 3) and the Supremacy Clause (Article VI, Clause 2).

1. In November 1980, the State of Washington, by voter initiative, enacted a statute (Initiative 383) prohibiting the transportation for storage within the State, or the storage itself, of nonmedical radioactive waste produced outside the State (Pet. Supp. App. A-22). The initiative also authorized the State to enter into a compact with other states to provide for the storage of such wastes (*id.* at A-22 to A-23).

The Hanford Reservation is a federally owned nuclear waste facility located in the State of Washington. The State leases 1,000 acres of the facility from the federal government, 100 acres of which the State, in turn, subleases to

respondent U.S. Ecology, Inc., a private operator of a low-level radioactive waste storage facility. The U.S. Ecology site is the only commercial facility in the United States that can store absorbed low-level radioactive liquids (Pet. Supp. App. A-21 to A-22, A-40 to A-42).

Following the enactment of Initiative 383, the United States, U.S. Ecology, and a number of other private parties connected with the nuclear industry in Washington filed suits in the United States District Court for the Western District of Washington challenging the validity of the statute under, inter alia, the Commerce Clause and the Supremacy Clause of the United States Constitution.[1] The district court struck down Initiative 383 on the grounds that it impermissibly interfered with interstate commerce (Pet. Supp. App. A-53 to A-63) and was preempted by federal law (*id.* at A-44 to A-52).

The Ninth Circuit affirmed (Pet. Supp. App. A-15 to A-35). The court of appeals first held (*id.* at A-26 to A-29) that Initiative 383 violated the Supremacy Clause because disposal of nuclear waste is governed by two federal statutes (the Atomic Energy Act of 1954, 42 U.S.C. (& Supp. IV) 2011 *et seq.*, and the Low-Level Radioactive Waste Policy Act, 42 U.S.C. (Supp. IV) 2021b *et seq.*), neither of which permits states to prohibit transportation or storage of out-

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[1]The State of Washington and various state officials were named as defendants. Petitioner, a nonprofit corporation affiliated with the sponsor of Initiative 383, was denied intervenor status by the district court, but was permitted to participate in the trial court proceedings as amicus curiae. Pet. 6-7. Although the court of appeals ruled (Pet. Supp. App. A-25 to A-26) that the district court erred in denying petitioner's motion to intervene, it held that no new trial was required because petitioner "was permitted to participate in the argument on the appeal from the order granting summary judgment, and its contentions were duly considered" (*id.* at A-26). Petitioner does not challenge that procedural ruling, but only the substantive aspects of the decision below. The State does not seek this Court's review of the decision below.

of-state waste before January 1, 1986 (and then only pursuant to interstate compact). The Court also found (Pet. Supp. App. A-29 to A-35) Initiative 383 invalid under the Commerce Clause because of the statute's discrimination against interstate commerce. In so ruling, the court specifically rejected the argument that the statute is exempt from Commerce Clause strictures as a "quarantine" measure (*id.* at A-34 to A-35).

2. The decision of the court of appeals is correct and is consistent with the prior decisions of this Court and the other courts of appeals. Further review by this Court therefore is not warranted.

a. Petitioner claims (Pet. 8-10) that the statute at issue here is a "quarantine" measure and that this case thus presents a question left open by the Court in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978). There is no merit to this contention.

In *City of Philadelphia*, the Court struck down as violative of the Commerce Clause a New Jersey statute that prohibited the importation of waste generated or collected outside the State assertedly because such material presented a health and safety hazard. See 437 U.S. at 625-626. The Court rejected the State's quarantine argument, observing that there was no claim that "the very movement of [the] waste" itself was hazardous. *Id.* at 629.

An identical situation obtains here. The legislative scheme at issue itself dispels the notion (Pet. 8, quoting *City of Philadelphia* v. *New Jersey*, *supra*, 437 U.S. at 629) that "the very movement of waste into or through [the State] endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible." Initiative 383 prohibited only transportation for storage within Washington or the storage itself of out-of-state waste; it

permitted transportation through the State of outside waste for disposal elsewhere. Moreover, the statute allowed shipments of in-state waste across the length of the State, while banning shorter out-of-state shipments. See C.R. 18 at No. 10.[2] Initiative 383 thus plainly cannot be defended on the ground that it is a quarantine measure arising out of the need for immediate disposal of dangerous material. Rather, here, as in *City of Philadelphia, supra*, 437 U.S. at 629, the harm against which the statute is directed is that which arises after the waste's disposal in a storage site. But at that point "there is no basis to distinguish waste generated in Washington from waste generated in other states" (Pet. Supp. App. A-60; see 437 U.S. at 629). Accordingly, the "virtually *per se* rule of invalidity" announced in *City of Philadelphia, supra*, 437 U.S. at 624, for statutes that directly discriminate against interstate commerce is equally applicable here.[3] See also *Illinois* v. *General Electric Co.*, 683 F.2d 206, 213-215 (7th Cir. 1982), petition for cert. pending, No. 82-648 (invalidating as violative of both the Commerce Clause and the Supremacy Clause an Illinois statute prohibiting the shipment into the state of spent nuclear fuel for storage).

Furthermore, even assuming Initiative 383 is not *per se* invalid because of its facially discriminatory nature, both courts below correctly found (Pet. Supp. App. A-32 to A-33, A-61 to A-63) that the statute violates the Commerce Clause because its burden on commerce outweighs any local benefits achieved. See *Edgar* v. *Mite Corp.*,

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[2]The designation "C.R." refers to documents in the clerk's record, which comprised the record in the courts below.

[3]As the Court observed in *City of Philadelphia* v. *New Jersey, supra*, 437 U.S. at 626-627, it is irrelevant that a statute may not have an economically discriminatory purpose so long as its effect is to discriminate against articles of commerce from without the state.

No. 80-1188 (June 23, 1982), slip op. 18; *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). As the court of appeals observed (Pet. Supp. App. A-32), while "the release of radioactive materials and emissions is inimical to the safety of the people of any state," the State of Washington has not explained "the manner in which local waste, transported and stored within Washington has superior safety and environmental virtues over waste produced elsewhere and similarly controlled by state regulatory measures."[4] Moreover, both courts below noted (*id.* at A-33; see also *id.* at A-63) that "[c]losing Washington's borders would significantly aggravate the national problem of low-level waste disposal." Accordingly, the courts below agreed that Initiative 383 not only directly discriminated against interstate commerce, but failed the *Pike* test as well.

b. The courts below also held Initiative 383 unconstitutional under the Supremacy Clause (Pet. Supp. App. A-26 to A-29, A-44 to A-52). This ruling too is plainly correct.

The Atomic Energy Act of 1954, 42 U.S.C. (& Supp. IV) 2011 *et seq.*, gave the Nuclear Regulatory Commission exclusive authority to regulate nuclear facilities and materials insofar as they present unique health and safety hazards, thus preempting state regulation of radiation hazards. See *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143, 1149 (8th Cir. 1971), aff'd, 405 U.S. 1035 (1972). The states therefore may regulate radiation hazards only insofar as the Act permits such regulation.

Section 274(b) of the Act, 42 U.S.C. (Supp. IV) 2021(b), permits the Commission to enter into agreements with states allowing them to assume certain regulatory functions

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[4]In this connection, the district court noted (Pet. Supp. App. A-62) that the State itself had concluded that, if properly regulated, nuclear waste can be safely transported. Less intrusive means to safeguard the public health thus were available.

such as licensing (Washington has such an agreement with the Commission). Any state regulation under Section 274, however, must be compatible with Commission programs concerning protection against radiation hazards. See 42 U.S.C. 2021(g). Nothing in Section 274, or in the Washington Section 274 agreement, in any way authorizes an individual state to enact discriminatory bans on the interstate commerce of radioactive waste for storage purposes, and such action is plainly at odds with the purposes of the Atomic Energy Act of 1954. See generally 42 U.S.C. 2013.

Petitioner nonetheless contends (Pet. 16-19) that Congress authorized state action such as Initiative 383 in the Low-Level Radioactive Waste Policy Act, 42 U.S.C. (Supp. IV) 2021b *et seq.* This claim is belied by the plain language of the statute on which petitioner relies.

The Act authorizes the states to enter into interstate compacts to manage low-level waste disposal on a regional basis. 42 U.S.C. (Supp. IV) 2021d(a)(2)(A). Only after January 1, 1986, however, may compacts restrict the use of their regional compact facilities to the disposal of low-level radioactive waste generated within the region. 42 U.S.C. (Supp. IV) 2021d(a)(2)(B). This delay affords the states the time necessary to make appropriate arrangements *before* they are excluded from low-level waste sites. Because the Act nowhere authorizes states to begin excluding low-level waste now, the courts below correctly concluded that Initiative 383 is preempted by existing federal statutes regulating radiation hazards.[5]

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[5]On January 7, 1983, the Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201, became law, further evidencing Congress' present intention to preempt the field of radiation hazards. That statute, however, deals primarily with the disposal of high-level radioactive waste (but see Section 151, 96 Stat. 2244), and while Initiative 383 purported to bar high-level as well as low-level out-of-state waste from

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1983

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storage or transportation for storage within the State, petitioner no longer claims that the State may regulate the transportation or storage of high-level waste. See Pet. i n.1; Pet. Supp. [redacted] App. A-24.

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